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We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees. . . . So also the duty of a judge becomes itself a question of degree, and he is a useful judge or a poor one as he estimates the measure accurately or loosely. †

I. Introduction

Admitting evidence of a criminal defendant's crimes or bad acts other than those with which he is currently charged (referred to in this article as "other crimes," "extrinsic acts," "other acts," or "uncharged offenses") raises hard questions for courts.[1] A number of legal scholars have given thoughtful attention to these questions.[2]

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† B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161-62 (1921).

1 Such evidence need not have resulted in conviction in order to be admissible. R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE (2d ed. 1982); 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 140, at 121 (1978). However, there must be some evidence connecting the defendant with the other crime. Evidence of other crimes, acts, or wrongs to prove character and conforming conduct normally carries moral overtones. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 779 & n.7 (1981). This evidence need not be crimes. It may simply be other acts not constituting criminal activity. *See* United States v. Roe, 670 F.2d 956, 966-67 (11th Cir. 1982). For convenience, this article will refer to the variety of other crimes, acts, or wrongs collectively as "other crimes."

2 R. LEMPERT & S. SALTZBURG, *supra* note 1, at 215-31; G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 124-46 (1938); 2 D. LOUISELL & C. MUELLER, *supra* note 1, § 140, at 113-45; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 190-191 (2d ed. 1972); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 132-56 (3d ed. 1982); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08]-[21] (1982); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §§ 5239-5250, at 427-551 (1978); Carter, *The Admissibility of Evidence of Similar Facts*, 70 LAW Q. REV. 214, 229 (1954); Kuhns, *supra* note 1, at 777; Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 OR. L. REV. 267 (1952); Payne, *The Law Whose Life is Not Logic: Evidence of Other Crimes in Criminal Cases*, 3 U. RICHMOND L. REV. 62 (1968); Slough, *Other Vices, Other Crimes*, 41 IOWA L. REV.

They have been concerned about the tendency of other crimes evidence to prejudice a defendant unfairly and detract from the factfinder's dispassionate consideration of the issues.[3] Yet they recognize that such evidence may be important, sometimes even necessary, to enable the prosecution to prove a defendant's guilt beyond a reasonable doubt.[4]

Courts and legislatures also have recognized the need for and the dangers of evidence of other crimes and have attempted to steer a middle course between acceptance and rejection. Both the Federal Rules of Evidence[5] and the common law generally make other crimes evidence inadmissible to show that the defendant's character is itself circumstantial evidence that he committed the charged offense; but they may admit it if offered for other purposes.[6] When offered for

325 (1956); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952); Weissenberger, *Character Evidence Under the Federal Rules: A Puzzle With Missing Pieces*, 48 U. CIN. L. REV. 1 (1979); Comment, *Rule 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis*, 71 NW. U.L. REV. 634 (1976); Note, *Proof of Prior Act Evidence*, 49 U. CIN. L. REV. 613 (1980); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961) [hereinafter cited as Note, *Other Crimes Evidence*].

This article deals only with offers of other crimes evidence by the prosecutor against a defendant in a criminal case under the Federal Rules of Evidence. While Rule 404(b) is not limited to criminal cases, most of the proof problems addressed by this approach arise in that context. *See* S. SALTZBURG & K. REDDEN, *supra* note 1, at 136-37, 151-52. The applicability of other crimes evidence against a criminal defendant's witnesses, prosecution witnesses, and in civil cases is not specifically considered in this article.

3 .United States v. Myers, 550 F.2d 1036, 1044-48 (5th Cir. 1977); R. LEMPERT & S. SALTZBURG, *supra* note 1, at 215-31; 2 J. WEINSTEIN & M. BERGER, *supra* note 2, 404[25]-[35].

4 *In re* Winship, 397 U.S. 358 (1970).

5 Pub. L. No. 93-595, 88 Stat. 1926 (1975), *reprinted in* 28 U.S.C. app. (1976 & Supp. II 1978).

6 Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This rule is deemed to be a codification of the common-law approach to the admissibility of other crimes evidence. That approach recognized the inherent prejudice attached to such evidence—the danger that juries would misuse it to weigh testimony based on character (a process that may result in conviction of a defendant because of his bad character) or would misconstrue its probative value. *See* Comment, *supra* note 2. Common-law approaches to other crimes evidence were either inclusionary or exclusionary. The former admitted such evidence for any relevant purpose *except* to prove character in order to show that a person acted in conformity therewith. The latter excluded all other crimes evidence for any purpose except those specified within the rule, usually the same as the examples set forth in Rule 404(b). There is considerable agreement that the only potential difference between the two approaches is that under the inclusionary approach the trial judge may more carefully analyze the proffered evidence for a relevant non-character purpose, while the exclusionary approach encourages labeling as a substitute for analysis and results in the "smuggling" in of

non-character purposes, other crimes evidence may still be excluded if the trial judge, balancing the evidence's probative value against its potential unfair prejudice, finds it unduly prejudicial.[7]

One of the several factors in any balancing is the probability that the other crime actually occurred.[8] In assessing this factor, courts have disagreed on how strong the proof of another offense must be to admit it. Even adoption of evidence codes like the Federal Rules of Evidence has not ended the debate.[9] Federal courts still use different standards to rule on the admissibility of other acts evidence.[10] One circuit has held that only "sufficient evidence" to permit a jury finding that the other crime occurred need be shown.[11] Another has held that other crimes must be proved by a "preponderance of the evidence."[12] Others have held that such evidence should be "clear and convincing";[13] and one circuit has been interpreted to require proof "beyond a reasonable doubt."[14]

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other crimes evidence to show character and conforming conduct. *See* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 215-19; Slough, *supra* note 2; *see also* S. SALTZBURG & K. REDDEN, *supra* note 2, at 128. Rule 404(b) adopts the inclusionary approach. Comment, *supra* note 2, at 636-39; *see* United States v. DeVaughan, 601 F.2d 42 (2d Cir. 1979).

7 United States v. Beechum, 582 F.2d 898 (5th Cir. 1978). Rule 403 requires judges to balance the probative value of evidence against its potential harm:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

For an excellent discussion of the general application of Rule 403, see Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220 (1976).

8 *See* text accompanying note 38 *infra*.

9 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[10], at 404-55 to 404-62; Dolan, *supra* note 7, at 234. The rules were enacted on Jan. 2, 1975. See S. SALTZBURG & K. REDDEN, *supra* note 2, at 1-6 for a short history of the codification of the Federal Rules of Evidence.

10 *See* 2 D. LOUISELL & C. MUELLER, *supra* note 1, § 140, at 118; 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[10], at 404-55 to 404-62; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5250, at 548. See McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293 (1982) for a challenge to the imprecision and proliferation of "burden of proof" language.

11 United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978). Other circuits have followed the Fifth Circuit's lead. *See, e.g.*, United States v. Chilcote, 725 F.2d 1498 (11th Cir. 1984).

12 *See* United States v. Leonard, 524 F.2d 1076, 1090-91 (2d Cir. 1975).

13 United States v. Evans, 697 F.2d 240, 248 (8th Cir. 1983); United States v. Bowman, 602 F.2d 160, 164 (8th Cir. 1979); United States v. Dolliole, 597 F.2d 102, 106-07 (7th Cir. 1979); Manning v. Rose, 507 F.2d 889, 892 (6th Cir. 1974).

14 *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 2, at 404-57 (citing United States v. Testa, 548 F.2d 847 (9th Cir. 1977)). At least one commentator has suggested that the standards should vary depending upon whether the litigation is criminal or civil. *See* Froncek, *Proof of Prior Act Evidence*, 49 U. CIN. L. REV. 613 (1980).

This article explores the rationale for the rules that determine when other crimes evidence will be admitted and argues that the potential for unfair prejudice is the primary reason for extreme caution in admitting such evidence. It then analyzes the concepts of unfair prejudice and probative value and argues that the levels of unfair prejudice associated with differing uses of other crimes evidence should dictate how strong the proof of the crime must be to satisfy the balancing approach of Rule 403.[15] Finally, this article suggests that no single standard of proof fits all cases but that a sliding scale is needed to give judges the appropriate flexibility in ruling on the admissibility of other crimes evidence.

II. Rules and Rationale

Rule 404(a) provides that character evidence is generally not admissible as circumstantial evidence of a conforming act.[16] This codifies the common-law approach, which excludes character evidence because it is both not very probative of conforming conduct (it does not create a very strong inference) and because it is likely to be misused by the factfinder.[17] Character evidence is also thought to in-

15 *See* note 7 *supra*.

16 Rule 404(a) provides:

> (a) *Character evidence generally*. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

The exceptions under Rule 404(a) reflect consideration of litigation needs, reduced prejudice, and fairness to the litigants. The first suggests that favorable character evidence is not likely to be damaging to the government's chance for a fair trial, whereas negative evidence offered against a defendant is likely to threaten a fair trial on the crime charged. Notwithstanding the exceptions set forth under Rule 404(a), the use of character evidence is narrowly circumscribed. Even its use by a defendant is restricted to pertinent character traits. FED. R. EVID. 404 advisory committee notes; R. LEMPERT & S. SALTZBURG, *supra* note 1, at 236-45; C. MCCORMICK, *supra* note 2, § 191, at 454-59; S. SALTZBURG & K. REDDEN, *supra* note 2, at 124-25.

17 This circumscription of the utility of character evidence generally is based on the recognition that such evidence

> is of slight probative value and may be very prejudicial . . . [inasmuch as] it tends to distract the trier of fact from the main question of what actually happened on the particular occasion [in question in the trial]. . . . It subtly permits the trier of fact

volve the dangers of arousing the jury's passions, thereby detracting from a rational consideration of the evidence as a whole, needlessly consuming time, and risking unfair surprise to the defendant.[18]

The probative value of all character evidence, including evidence of other crimes, is often not very great, while it usually will have substantial prejudicial effects.[19] Consider, for example, a defendant on trial for murdering an auto mechanic with a handgun. He denies having been in town on the day of the murder. The prosecutor may seek to introduce evidence that the defendant robbed a bank in the same town two months earlier. This evidence has very low relevance, since it is not helpful on the identity issue in the murder case. The most it shows is that the defendant had committed a crime and was in town two months before the charged offense. Since many people who commit one crime never commit a second, the pro-

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to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

6 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 615 (1964); Stone, *supra* note 2; *see* FED. R. EVID. 404 advisory committee note; *see also* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 217-21; C. MCCORMICK, *supra* note 2, at 447, 454.

The component of "probative value" referred to here is the degree of persuasiveness. It might reasonably be said that a person is only slightly less likely to act out of character rather than in what another understands to be his character. The distinction behind the predictability of behavior based on perceived character traits (deemed to be low) and that based upon habitual conduct (deemed to be high) underlies the different treatment of character and habit under Rules 404 and 406. C. MCCORMICK, *supra* note 2, at 462-65; *see also* Kuhns, *supra* note 1, at 779-80 nn.9-10.

18 1A J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 57, at 1180-85 (Tillers rev. 1983). If the common law was concerned that the blunt edge of general character evidence produced the dangers of arousing, confusing, and distracting the jury, consuming time, and risk of surprise, it was alarmed about the sharp potential of specific criminal acts to produce even greater dangers. C. MCCORMICK, *supra* note 2, § 186, at 442-43. Reputation evidence was deemed to have a lesser tendency to arouse, distract, consume time, or risk surprise than evidence of opinion or specific instances. *See* 1A J. WIGMORE, *supra*, § 58.2, at 1212. *But see* C. MCCORMICK, *supra* note 2, § 186, at 443, criticizing the relevant sections in Wigmore. These limitations on the manner of proof of character have been carried forward in Rule 405.

19 *See* note 18 *supra*; R. LEMPERT & S. SALTZBURG, *supra* note 1, at 217-19; C. MCCORMICK, *supra* note 2, at 442-43. For a thoughtful analysis of the use in Rule 404(b) of the concept of character in determining the admissibility of specific acts evidence, see Kuhns, *supra* note 1, at 804, 809.

Note that the defendant's right in a criminal case to introduce evidence that would create a reasonable doubt, e.g., evidence of his own good character, or in a homicide case evidence of the character of the victim to show he was the first aggressor, is the policy behind Rule 404(a)(1) and (2). *See* S. SALTZBURG & K. REDDEN, *supra* note 2, at 125. The rule does not apply when character is an element of the crime, claim, or defense. In these cases Rule 405(b) governs admissibility. Also, no exception to the ban on the substantive use of character evidence is made for civil cases. *See* FED. R. EVID. 404 advisory committee note.

bative value of this evidence by itself is low,[20] and the two-month time gap between the uncharged and charged offenses makes the evidence of little value to prove opportunity. Further, the evidence carries all the dangers of unfair prejudice identified at common law. It may cause the jury to regard the defendant as a bad person, the kind of person who makes a vocation of committing crimes,[21] and to conclude that he should be punished even if there is only weak evidence connecting him with the charged murder. If the defendant was not convicted of the bank robbery, the power of this inference of bad character may be enhanced by the jury's sense of retribution, i.e., its desire to sanction the defendant for another crime he seems to have "got away with."[22] A subtler result may be that the jury will be less willing to listen to the defendant's evidence or may have fewer scruples about making a wrong decision.[23]

If the uncharged robbery has not been the subject of criminal prosecution and the defendant disputes his guilt or involvement, presenting evidence of whether he committed the robbery may be so

20 *See* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 218 n.49; J. MONAHAN, PREDICTING VIOLENT BEHAVIOR 95-128 (1981).

21 1 J. WIGMORE, *supra* note 18, § 58.2, at 1212; Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 524-30 (1983); *see* Stone, *supra* note 2, at 998.

In explaining Rule 403, which requires that probative value be balanced against unfair prejudice, the Advisory Committee Note states:

> The case law recognized that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. [Citations omitted]. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Rule 404(b), one of the relevance rules alluded to in the foregoing excerpt, is based on the assumption that other crimes evidence is inherently prejudicial. *See* C. MCCORMICK, *supra* note 2, § 190, at 447; Weinstein, *Federal Relevancy Rules*, 4 GA. L. REV. 43, 86-87 (1969). Traditionally, 404(b)-type rules have been characterized as excluding evidence of a propensity to commit the act in question. Professor Kuhns challenges the adequacy of the propensity concept to rationalize admissibility decisions in the other crimes area. Kuhns, *supra* note 1.

22 R. LEMPERT & S. SALTZBURG, *supra* note 1, at 219.

23 Note, *Other Crimes Evidence*, *supra* note 2, at 773-74. This effect may also be thought of as altering the jury's regret matrix. *See* R. LEMPERT & S. SALTZBURG, *supra* note 1, 162-65; Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-41 (1977) (and cases cited therein).

protracted as to become a trial within a trial.[24] The jury may be distracted by the "inner trial" and confuse the issues, or take their conclusion that the defendant committed the robbery as proof that he committed the murder.[25] A detailed presentation of the robbery might overemphasize its prejudicial aspects, making it both less helpful to the jury and less susceptible to clear evaluation.[26]

Although the robbery may have little if any relevance to the murder, the jury may overestimate the weight of the other crime and conclude that since the defendant committed a robbery, he is substantially more likely to have committed the murder.[27] This problem of misestimation is exacerbated if the other crime is the same or similar to the charged offense, for example, another murder.[28] Further, if the prosecutor gives no notice of his intention to introduce evidence of another crime, the defendant might be surprised and unable to mount an effective defense.[29] All these dangers associated with other crimes evidence lead to one essential harm: an influence on the jury verdict that is not attributable to the probative force of the evidence concerning the charged crime.[30] The result may be an unfair convic-

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24 *See* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 188-89, 219; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5250, at 549.

25 R. LEMPERT & S. SALTZBURG, *supra* note 1, at 188-89; Dolan, *supra* note 7, at 238-40; Note, *Other Crimes Evidence*, *supra* note 2.

26 See Weinstein, *supra* note 21, at 92-99, for a discussion of how the manner of presenting the evidence may raise or lower the prejudice involved. *See* United States v. Ostrowsky, 501 F.2d 318 (7th Cir. 1974)(showing how counsel's overly detailed presentation of the evidence led to a finding of prejudice); *see also* United States v. Benton, 637 F.2d 1052 (5th Cir. 1981); People v. Collins, 68 Cal. 2d 319, 438 P.2d 33 (1968).

27 This kind of prejudice is often referred to as misleading the jury. *See* People v. Collins, 68 Cal. 2d 319, 438 P.2d 33 (1968); Dolan, *supra* note 7, at 237-42; Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223 (1966). See J. MONAHAN, *supra* note 20, at 95-128, for an excellent study of the predictive value of other crimes evidence.

Whatever the true probability that commission of a crime will be followed by other criminal acts, it is highly unlikely that the aggregate intuitions of a jury will produce an accurate assessment of the worth of such evidence. Furthermore, even if statistics indicating the probability of a second theft, given a first, were available, a jury's ability to ascribe to such evidence only its properly proportioned weight is highly questionable. *See* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 160-62, 219.

28 *See* note 48 *infra*.

29 See United States v. Jones, 570 F.2d 765 (8th Cir. 1978), which presented such a problem. In that case a physician was prosecuted for unlawfully distributing quaalude, a controlled drug. The prosecutor introduced evidence that the physician distributed the same or similar drug on 478 other occasions. The court noted that the defendant was prejudiced, inter alia, by his inability to respond to the numerous charges.

30 A shorthand term I use for the dangers discussed in the text and specifically set forth in Rule 403 is "unfair prejudice." "Prejudice" means only harmful effect, while "unfair prejudice" means that the evidence not only has significant impact on the defendant's case

tion of a criminal defendant.

The persuasiveness of other crimes evidence is deemed to be higher, however, when it is offered for a relevant, non-character purpose than when it is offered to infer conduct from some character trait which the other crimes evidence suggests.[31] Thus if a defendant denies having committed the murder for which he is on trial, the prosecutor may introduce evidence that a week before the victim was murdered, the defendant robbed the First National Bank; the victim was a customer in the bank at the time of the robbery; the defendant knew the victim before the robbery; and they exchanged glances during the robbery. Such evidence creates a strong inference that the defendant, and not someone else, committed the charged murder.[32] In this case, the evidence may nevertheless give rise to the prohibited inference that the defendant is "a robber." Thus, no matter why the other crimes evidence is offered, there always remains the chance that it will indicate to a jury that the defendant is a particular kind of person. Where the defendant's character is bad, the jury may be distracted from the facts of the case and penalize him for being generally a bad person. For this reason, judges must be careful to balance probative value and prejudicial effect in the context of each particular case.

A. *Proof of Other Crimes as a Function of Probative Value*

The probative value[33] of an item of circumstantial evidence is its

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but also that its admission results in some unfairness to the defendant because of its non-probative aspect. *See* S. SALTZBURG & K. REDDEN, *supra* note 2, at 102 n.7; 1 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 403[03], at 403-18 to 403-22; *see also* Gold, *supra* note 21, at 506-10 (describing unfair prejudice as the tendency to cause the jury to commit inferential error). In this article, "prejudice," "prejudicial" or prejudicial effects refers to the dangers of "unfair prejudice" and the other policy counterweights of Rule 403.

31 R. LEMPERT & S. SALTZBURG, *supra* note 1, at 220-22; C. MCCORMICK, *supra* note 2, § 190, at 447-54; *see also* Kuhns, *supra* note 1, at 800; Note, *Other Crimes Evidence*, *supra* note 2, at 769.

32 *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[14], at 404-78 to 404-80 (and cases cited therein). For examples of permissible uses of other crimes evidence, see R. LEMPERT & S. SALTZBURG, *supra* note 1, at 235, and 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[12], [16].

33 Where the other crime sought to be introduced is not the subject of a conviction, it is not necessary to establish the defendant's participation in the crime beyond a reasonable doubt—the standard that would be applied were the defendant being actually tried for the other crime. Due process requires that each element of the offense in a criminal case be proved beyond a reasonable doubt. *In re* Winship, 397 U.S. 358 (1970). Other crimes proof under a lesser standard would present a problem only in the rare case where the other crimes evidence constituted the only evidence on an element of the crime, e.g., intent in a theft case. In those cases, the defendant probably would be entitled to a directed verdict if the prosecu-

tendency to make the existence of a relevant fact more or less likely than it would be without the evidence.[34] Three factors affect the probative value of other crimes evidence. One is its relationship to other evidence available to the prosecution.[35] If other evidence proves disputed factual issues, one more piece of proof on the same issue may have only low probative value. Thus the probative value of an item of evidence turns in part on the evidence that precedes it.[36]

A second factor is the strength of the inference the factfinder is asked to draw from the evidence of other crimes. Evidence in a murder prosecution that the defendant was seen fleeing the scene of the shooting with a smoking gun seconds after shots were heard will support a stronger inference of his guilt than evidence that he was a beneficiary of the victim's life insurance policy.[37]

A third factor affecting the probative value of other crimes evidence is whether it is true.[38] Did the defendant really run from the scene seconds after the shooting with a smoking gun? Did he and the victim actually have an argument shortly before the murder? If the

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tor, in the absence of other evidence of intent, were unable to establish his commission of the other crime beyond a reasonable doubt.

34 Rule 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

See C. MCCORMICK, *supra* note 2, at 438-39 n.30; Dolan, *supra* note 7, at 233-35.

35 *See* United States v. Beechum, 582 F.2d 898, 914, 917 (5th Cir. 1978); C. MCCORMICK, *supra* note 2, at 439 n.30; Dolan, *supra* note 7, at 233-35. On the factor of need in Rule 403 balancing, see note 112 *infra*. *See also* 2 LOUISELL & C. MUELLER, *supra* note 1, § 140, at 116-17; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5250, at 546-47.

36 If the other crimes evidence has little incremental probative value, it will almost certainly be excluded under Rule 403 as disproportionately prejudicial. Conversely, other crimes evidence is considered by many courts to be non-probative where offered to prove an uncontested issue. *See* United States v. James, 555 F.2d 992, 1000 n.46 (D.C. Cir. 1977); *see also* 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[09], at 404-49 to 404-51.

37 The logical probative value of a relevant fact is affected by how inferentially remote the fact is from the actual issue to be proved. *See* C. MCCORMICK, *supra* note 2, at 439; 1 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 401[08]-[09], at 401-28 to 401-37; Dolan, *supra* note 7, at 233-35; James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 694-99 (1941); Slough, *Relevancy Unraveled*, 5 KAN. L. REV. 1, 10-12 (1956); Trautman, *supra* note 2, at 388-92. *See also* United States v. Rubin Gonzales, 674 F.2d 1067, 1078 (5th Cir. 1982).

38 *See* C. MCCORMICK, *supra* note 2, § 190, at 453; Note, *Other Crimes Evidence*, *supra* note 2, at 770. The Fifth Circuit stated in United States v. Benton, 637 F.2d 1052, 1057 (5th Cir. 1981), that "[t]he probative value of extrinsic offense evidence may be measured by whether and to what extent the accused's motive, intent, etc., are established by other evidence, stipulation, or inference." *See also* 2 D. LOUISELL & C. MUELLER, *supra* note 1, § 140, at 118; 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[10], at 404-55 to 404-62; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5250, at 548; Dolan, *supra* note 7, at 233.

evidence is false, it cannot support the inference for which it is offered. If the evidence concerning the flight or the argument is untrue, it would be impossible to infer from these statements that the defendant was conscious of his guilt and therefore guilty, or had a motive to kill the victim and therefore killed him.[39] Naturally, a factfinder rarely if ever will know with absolute certainty whether evidence is true or false. Thus the question becomes how much proof there must be that the other crimes evidence is true to warrant admitting it. This is the question that has caused so much difficulty.

The probative value of other crimes evidence, if the evidence is true, diminishes as the probability decreases that the defendant actually committed the other crimes. Courts observing this relationship speak of a "requisite degree of relevance"[40] or "reliability,"[41] or of something "reducing"[42] or "weakening" probative value.[43] They recognize that the probative value of other crimes evidence rises and falls with the probability that the defendant actually committed the extrinsic act.[44]

III. Two-Step Balancing to Achieve the Requisite Certainty

Assuming that other crimes evidence is probative of something besides character and is not cumulative, it is prima facie admissible under Rule 404(b). But it is also likely to be unfairly prejudicial.

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39 *See* Lempert, *supra* note 23, at 1052 (discussing the diminished probative value of impeached testimony). Lack of reliability of other crimes evidence based on failure of proof produces an analogous result.

40 United States v. Foskey, 636 F.2d 517, 524 (D.C. Cir. 1980) (quoting United States v. Hernandez-Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979)).

41 United States v. Dolliole, 597 F.2d 102, 106 (7th Cir. 1979).

42 United States v. Shavers, 615 F.2d 266, 271 (5th Cir. 1980).

43 United States v. Herrera-Medina, 609 F.2d 376, 380 (9th Cir. 1979); *see also* 2 J. WEINSTEIN & M. BERGER, *supra* note 2, at 404-62 to 404-63. Probative value may also be referred to as weight of the evidence. It is widely recognized that juries weigh evidence depending upon their determination of the credibility of a witness. Thus, the testimony of an eyewitness to a shooting who is shown through cross-examination to have lacked an opportunity adequately to observe the shooting, or to harbor some intense disdain for the defendant, will be assigned very little weight (or probative value) even though, if believed, it would seal the prosecutor's case. *See* Lempert, *supra* note 23, at 1052-55. An identical weighing process is performed by the judge in determining the probative value to be assigned to other crimes evidence. The probative weight of such evidence turns on the certainty of the prosecutor's proof that the defendant actually committed the other crime. Discounting of probative value for lack of proof may be thought of as analogous to discrediting testimony where a witness has demonstrated lack of trustworthiness.

44 See United States v. Biswell, 700 F.2d 1310, 1318 (10th Cir. 1983), where the court held that the vagueness of the proof of the other crimes made its reliability questionable and diminished its probative value.

Trial judges must balance the magnitude of probative value against prejudicial effect to determine admissibility.[45] This article's thesis is that the balancing should be done in two steps. First, the judge should balance under Rule 403 as though proof of the other crime were certain. If it appears tentatively admissible, the judge should then consider the degree to which the other crime has been proved and strike a second, *true* balance between probative value and unfair prejudice. This second step results in the ultimate determination of admissibility.

A. *Risk Unfair of Prejudice*

In the first balancing step, other crimes evidence can be usefully considered on a sliding scale of risk. High risk evidence consists of egregiously offensive or particularly reprehensible acts that are certain to raise the ire of jurors and cause them to seek retribution.[46] It carries great danger of unfair prejudice, because the jury is likely to infer from the other crimes evidence that the defendant *is* a "murderer," "robber," "rapist," or "drug pusher," and proceed to convict him on evidence of his bad character rather than because the evidence proves him guilty of the charged offense. More subtly, the "regret matrix" may be altered because of the inflammatory nature of the evidence, making the jury less concerned about reaching a wrong verdict.[47] Evidence of acts highly similar to those charged in the pending criminal action also falls in the high risk range.[48] When the

45 United States v. Beechum, 582 F.2d 898, 917 (5th Cir. 1978); FED. R. EVID. 403; C. MCCORMICK, *supra* note 2, at 447; 1 J. WEINSTEIN & M. BERGER, *supra* note 2, at 403-15 to 403-17; Dolan, *supra* note 7.

46 1 J. WEINSTEIN & M. BERGER, *supra* note 2, at 403-415 to 403-417; *see also* 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5250, at 548-49.

47 R. LEMPERT & S. SALTZBURG, *supra* note 1, at 162-65, 218.

48 United States v. Beechum, 582 F.2d 898, 914, 915 n.20 (5th Cir. 1978); 2 D. LOUISELL & C. MUELLER, *supra* note 1, § 140, at 120. In a related context, the court in Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964), described three ways in which prejudice may operate where similar offenses by the same alleged defendant are joined for prosecution:

> (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

331 F.2d at 88.

Rule 14 of the Federal Rules of Criminal Procedure provides that the court may sever counts of an indictment or information for separate trials if it appears that the defendant would be prejudiced by the joinder of charges under Rule 8.

The interests to be balanced in deciding questions of joinder and severance are those of avoiding redundant, time-consuming trials in which the same factual and legal issues must be

other crimes are less offensive and/or less similar to the charged offense, the risk of unfair prejudice decreases to middle or lower levels.

The suggested scaling of prejudice into high, middle, and low degrees of risk provides courts with an analytical framework to assess the standard of certainty which proof of other crimes must meet in order to warrant admissibility. Higher certainty, as noted earlier, increases the probative value of the other crimes evidence. Since probative value must be balanced against prejudicial dangers for the evidence to be admitted, the appropriate standard of certainty must vary with the risk of unfair prejudice generated by the evidence.

Higher prejudice demands higher certainty for admissibility, and lower prejudice permits admission with lower certainty. The standard of certainty must itself be viewed as a sliding scale. [See Figure 1.] When the proof of other crimes is sufficiently certain to raise the probative value of the evidence above the threshold of impermissible prejudice, it has reached the level of certainty required by Rule 403.

The standard of proof thus depends upon the amount of prejudice the evidence engenders. Once this relationship between the balancing test of Rule 403 and the required certainty of other crimes proof is perceived, it is clear that any single inflexible standard, such as "preponderance of the evidence," "clear and convincing evidence," or "beyond a reasonable doubt," is too wooden. That is, a court can properly tolerate less certainty that the defendant committed the other crime if the risk of prejudice is at the low end of the scale. Conversely, it must demand greater certainty when the danger of unfair prejudice is high.

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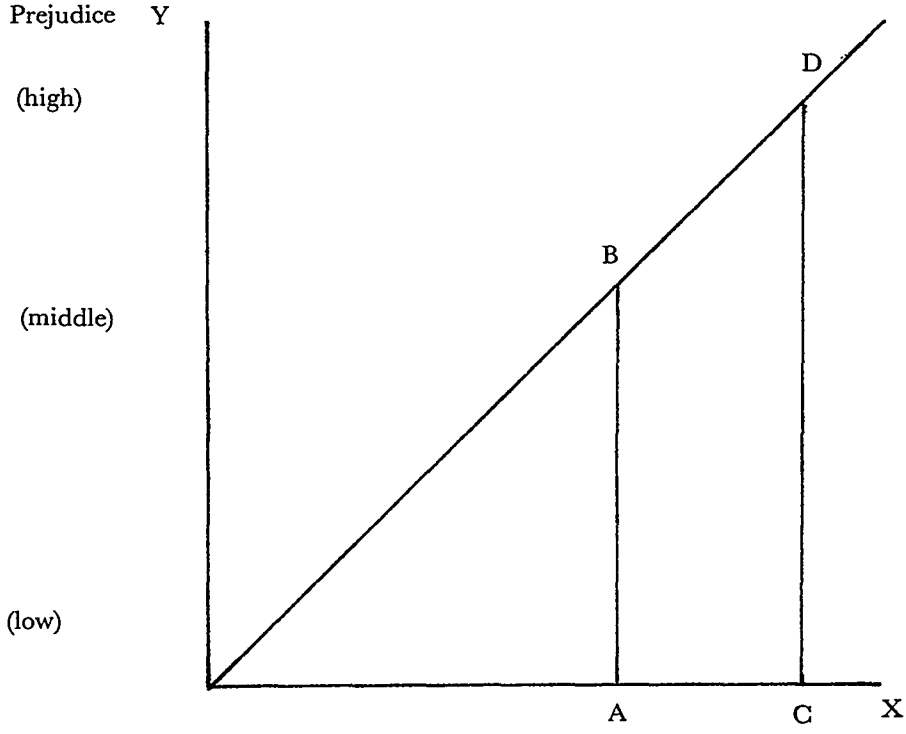
litigated, and avoiding prejudice. The state's interest thus differs in this context from its interest in the other crimes admissibility setting, where it wishes to place before the jury all relevant evidence of guilt. Nonetheless, courts sometimes analyze the need for severance of similar offenses by deciding their admissibility as other crimes evidence in separate trials and find their being admissible under Rule 404(b) conclusive grounds for the denial of severance. *See* United States v. Mullen, 550 F.2d 373 (6th Cir. 1977) (Engel, J., concurring in part, dissenting in part). Conversely, this analysis suggests that similar offenses severed because of failure to pass muster under a Rule 404(b)-403 analysis should not be admissible as other crimes evidence at the separate trial of either offense. The proponent should be denied backdoor passage where the front has been foreclosed.

Highly similar other crimes evidence may also increase the probative value of the evidence, as in modus operandi cases and some cases where the other crimes evidence is offered to prove intent. The simultaneous increase in probative value and prejudice complicates the balancing analysis. *See* notes 139-48 *infra* and accompanying text.

Figure 1. The Sliding Scale of Probative Value Required for Evidence of Other Crimes.



This graph illustrates the sliding scale of proof to be applied to other crimes evidence. The Y axis shows the degree of prejudice the evidence is likely to raise. The X axis represents the degree of certainty that the defendant committed the other crime. The upward sloping line moving from the origin shows the amount of evidentiary probative value required to offset varying degrees of prejudice. Lines A-B and C-D show the increasing degree of certainty (a more stringent standard of proof) required as other crimes evidence moves from the middle to high range of prejudice.

B. *Preliminary Rulings on Admissibility*

Under Rule 403, the judge must balance probative value against prejudicial effect.[49] Some of the confusion concerning admissibility of other crimes evidence is attributable to uncertainty about whether the decision to admit such evidence is a matter of preliminary fact-finding for the judge (as it is with technical exclusionary rules), or an issue of conditional relevancy, which requires only prima facie evi-

49 FED. R. EVID. 403; *see also* Dolan, *supra* note 7, at 225. In most instances this article generally refers to any of the six categories of evidentiary misuse set forth in Rule 403 as "prejudice."

dence (or evidence sufficient to permit a jury finding).[50]

In a classic law review article,[51] Edmund M. Morgan delineated the roles of the judge and jury in preliminary fact finding.[52] He suggested that the jury system operates more effectively when judges decide preliminary facts upon which the technical rules of exclusion are conditioned.[53] Such rules, including those concerning privileges, competency of witnesses, hearsay, and original documents, may result in the exclusion of *relevant* evidence on grounds of reliability or some other policy. These rules are thought of as screening devices designed to guard against specific problems.[54] In these cases, the judge usually must determine preliminary facts by a "preponderance of the evidence" standard of proof.[55]

While the technical exclusionary rules may for policy reasons keep out even relevant evidence, conditionally relevant evidence is relevant only if the condition is proved to exist.[56] Preliminary questions of conditional relevancy are to be decided by the jury if the proponent produces "sufficient" evidence for the jury to make a finding.[57] For example, in a murder case where the prosecutor offers evidence that the defendant was the beneficiary of a large life insurance policy on the victim, such evidence is relevant only on the condition that the prosecutor can show the defendant knew that he had been

50 *See* FED. R. EVID. 104(a), (b); *see also* United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978); 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5054, at 268-69; Laughlin, *Preliminary Questions of Fact: A New Theory*, 31 WASH. & LEE L. REV. 285, 286 (1974).

51 Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929).

52 *Id.* at 165-66. Several other scholars have discussed the distinction between the roles of the judge and the jury in preliminary factfinding as a function of whether the preliminary question is one of competency or relevancy. *See* Laughlin, *supra* note 50, at 287; Maguire & Epstein, *Preliminary Questions of Fact as Determining the Admissibility of Evidence*, 40 HARV. L. REV. 292 (1927).

53 Morgan, *supra* note 51, at 166-69.

54 S. SALTZBURG & K. REDDEN, *supra* note 2, at 28; Morgan, *supra* note 51, at 169.

55 Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975); *see also* 1 D. LOUISELL & C. MUELLER, *supra* note 1, § 35, at 260-62, 265-67; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, §§ 5053, 5054, at 253-73.

56 *See* FED. R. EVID. 104(b); R. LEMPERT & S. SALTZBURG, *supra* note 1, at 1058-60; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5054, at 265-73.

57 1 D. LOUISELL & C. MUELLER, *supra* note 1, § 31, at 219. The "sufficiency" standard is also referred to as prima facie evidence. *See* C. MCCORMICK, *supra* note 2, § 53, at 125 n.1; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5054, at 268-69. *But see* Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980) (challenging conventional thinking regarding the independent relevancy of conditional and conditioned facts to an ultimate issue). Professor Ball's analysis does not suggest a different effect (from that suggested by this article or conventional judicial and scholarly thinking) of truth on the probative value of other crimes evidence. *See also* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 1058-59 & n.3, 1060.

named beneficiary. Once the prosecutor produces enough evidence of defendant's knowledge of the policy to support a jury finding, the judge admits the evidence, leaving the final determination of defendant's knowledge to the jury. The rationale for permitting the jury to decide questions of conditional relevancy is that the jury will readily understand the connection between the preliminary fact and the relevancy of the evidence, and that such a preliminary determination will not encumber its role as ultimate factfinder.[58] The judge's role in ruling on the admissibility of conditionally relevant evidence is thus limited to determining whether sufficient evidence exists to support a jury finding.[59] This "sufficiency" standard requires the judge to decide only whether a jury could reasonably find the existence of the preliminary fact from the supporting evidence.[60]

The Fifth Circuit in *United States v. Beechum*[61] correctly pointed out that the Federal Rules of Evidence have codified the functions of judge and jury as outlined by Professor Morgan.[62] Rule 104(b), "relevancy conditioned on fact," provides:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

It follows then, as the court observed, that the issue of whether a

58 C. MCCORMICK, *supra* note 2, § 53, at 125; *see also* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 1058 (citing C. MCCORMICK, *supra* note 2, § 53, at 125); 1 D. LOUISELL & C. MUELLER, *supra* note 1, § 26, at 158; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5054, at 266-67; *cf.* Laughlin, *supra* note 50, at 300-04.

Another rationale for the conditional relevancy exception to a judge's authority to make preliminary determinations is the fear that his ruling would deprive the parties of a jury trial where the preliminary and ultimate facts coincide. *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5054, at 266; *see also* 1 D. LOUISELL & C. MUELLER, *supra* note 1, § 33, at 236-37.

59 C. MCCORMICK, *supra* note 2, § 53, at 125.

60 United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978). The "sufficiency" requirement has also been described as one of prima facie evidence. Also note that the judge can effectively direct a verdict on a preliminary issue under Rule 104(b) where "no reasonable jury could disbelieve the preliminary fact, and the opponent offers no evidence contrary to the preliminary fact." Under these circumstances the judge simply refuses to instruct the jury to disregard the evidence if it is not convinced of its relevance. 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5054, at 269.

61 582 F.2d 898 (5th Cir. 1978).

62 *Id.* at 913; *see* Morgan, *supra* note 51; *see also* FED. R. EVID. 104 advisory committee note. Rule 104(a) provides:

> (a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

defendant committed another crime is one of conditional relevancy to be decided under Rule 104(b).[63] The relevancy of the other crimes evidence can be established only if the defendant can be shown to have committed the act. If it never took place, or was committed by someone else, it is not relevant to the charge for which the defendant is being tried. This is precisely the kind of conditional relevancy question which traditionally falls within the jury's competence.[64]

In ruling on the admissibility of conditionally relevant evidence under Rule 104(b), a judge must often perform a task in addition to assessing whether there is sufficient evidence for the jury to find that the condition exists that makes the evidence relevant. He may have to balance the probative value of evidence against its prejudicial impact. Rule 403 provides for the exclusion of relevant evidence where the danger of unfair prejudice, or any of the other enumerated considerations, substantially outweighs its probative value.[65] The power of exclusion under Rule 403 rests with the trial judge.[66] Since the degree of certainty that the defendant committed the other crime determines in part its probative value as evidence, the judge must consider the level of proof in balancing under the rule.[67]

Of course, in many cases involving questions of conditional relevancy, the judge need not perform this balancing test because the evidence is not unfairly prejudicial, i.e., there is no danger that a jury would use it improperly.[68] For example, a prosecutor in an armed robbery trial may try to establish the defendant's identity by introducing evidence that just before the robbery the defendant's uncle loaned him his car with the uncle's pistol in the glove compartment. Since the defendant is on trial for armed robbery, admitting evidence of how he secured a weapon such as the one used in the crime, although damaging to him, is not unfairly prejudicial.[69] The effect of this evidence is solely attributable to its probative force and not to

63 582 F.2d at 913. Compare Professor Laughlin's view that the defendant's commission of the other crime should be established to the satisfaction of the judge before it is admitted. Laughlin, *supra* note 50, at 308-09; *see* Kuhns, *supra* note 1, at 809 (arguing for a more stringent check against admissibility).

64 *See* notes 59-60 *supra* and accompanying text.

65 *See* note 15 *supra*.

66 *See* FED. R. EVID. 403 advisory committee note.

67 *See* 2 D. LOUISELL & C. MUELLER, *supra* note 1, § 140, at 118; C. MCCORMICK, *supra* note 2, § 190, at 453; 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[10], at 404-55 to 404-62; 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5052, at 548; *see also* notes 38-44 *supra* and accompanying text (discussing probative value).

68 *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5054, at 271.

69 *See* Dolan, *supra* note 7, at 238; *see also* text accompanying notes 46-48 *supra* (discussing the various types of prejudice); R. LEMPERT & S. SALTZBURG, *supra* note 1, at 156-67.

any tendency to improperly influence the jury. There would be no need to balance under Rule 403, since the jury would have no trouble evaluating the appropriate weight to give the evidence.

On the other hand, if the evidence were that the defendant stole the car containing the gun from his uncle, the jury might have less regret than normally expected at mistakenly convicting the defendant, "a thief," for the charged armed robbery.[70] Thus even if "sufficient" evidence existed under Rule 104(b) to support a jury finding that the defendant stole his uncle's car, the judge would still have to balance its probative value against its prejudicial impact under Rule 403.[71] It is at this point in the analysis that the certainty of proof will determine admissibility. If the degree of certainty is not great enough to produce a magnitude of probative value that prevents substantially weightier prejudice, the judge should exclude the evidence under Rule 403.[72]

C. *Determining Unfair Prejudice and Probative Value*—United States v. Beechum

In *United States v. Beechum*,[73] one of the leading cases on the admissibility of other crimes evidence, the Fifth Circuit showed how balancing under Rule 403 might be done. Beechum had been convicted of unlawfully possessing an 1890 silver dollar that he knew to have been stolen from the mails. On review the Fifth Circuit, rehearing en banc a panel decision reversing the trial court's conviction, held that the trial court had properly admitted evidence that at the time of his arrest Beechum also possessed two credit cards that apparently had been stolen from the mails approximately ten months earlier.[74] The court reasoned that the evidence was relevant to the issue of his intent in possessing the silver dollar, since his unlawful intent

70 *See* note 47 *supra*.

71 This observation also argues for not admitting other crimes evidence subject to "connecting up" under Rule 104(b). The jury is less likely to be able to disregard the evidence when connecting evidence is not forthcoming. *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5054, at 271.

72 Rule 403 provides for balancing of all unfairly prejudicial evidence, not just other crimes evidence. Such balancing will practically always be required when other crimes evidence is offered because of its inherently prejudicial nature. *See* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 220.

73 582 F.2d 898 (5th Cir. 1978).

74 *Id.* at 916. Relevance had been shown in the *Beechum* case because:

> The extrinsic offense is relevant [connected] (assuming the jury finds the defendant to have committed it) to an issue other than propensity because it lessens the likelihood that the defendant committed the charged offense with innocent intent.

Weinstein and Berger point out that "[e]vidence is relevant once it appears 'to alter the

in possessing the credit cards made it more likely that he possessed the silver dollar with the same intent. The court found that sufficient evidence existed to support a jury finding that the defendant intended permanently to deprive the owners of their credit cards and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.[75] In analyzing the danger of prejudice, the court said:

> The extrinsic offense here is not of a heinous nature; it would hardly incite the jury to irrational decision by its force on human emotion. The credit card evidence was no more likely to confuse the issues, mislead the jury, cause undue delay, or waste time than any other type of extrinsic offense evidence.[76]

In reversing the panel's finding that the government had not established by "plain, clear, and convincing" evidence that the cards were stolen from the mail, the court found that "there was sufficient evidence for the jury to find that Beechum possessed property belonging to the others, with the specific intent to deprive the owners of their rightful possession permanently."[77]

The court analyzed the inferences that may be drawn from government's proof as follows:

> Beechum possessed the credit cards of two different individuals. Neither card has been signed by the person to whom it was issued. When asked about the cards, Beechum answered first that the only cards he had were his own. When confronted with the credit cards, which were obviously not his own, Beechum responded that they had never been used. He refused to respond further because the inspector "had all the answers." The logical inference from this statement is that Beechum was attempting to mitigate his culpability, having been caught red-handed. The undisputed evidence indicated that he could have possessed the cards for some ten months. The jury would have been wholly justified in finding that Beechum possessed these cards with the intent permanently to deprive the owners of them.[78]

The *Beechum* court thus determined (1) that the other crimes evidence did not entail an inherently high risk of unfair prejudice and (2) that the government's proof of facts supporting the inference of intent was sufficiently certain to justify a finding that the probative

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probabilities of a consequential fact.'" 1 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 401[06], at 401-18.

75 United States v. Beechum, 582 F.2d 898, 917-18 (5th Cir. 1978).

76 *Id.* at 917.

77 *Id.*

78 *Id.* at 916.

value of the evidence was not substantially outweighed by its danger of prejudice.[79]

Beechum thus makes clear that proof of the defendant's actually having committed another crime is a question of conditional relevancy. Accordingly, the judge does not decide the issue. Equally clear, however, is the judge's obligation under Rule 403 to balance probative value against unfair prejudice.[80] The relationship between

79 *Beechum* overruled United States v. Broadway, 477 F.2d 991 (5th Cir. 1973). In *Broadway*, the defendant had been indicted for "transporting and causing to be transported in interstate commerce a falsely made and forged security." *Id.* at 992. The court of appeals held that a trial judge improperly admitted evidence of two other money orders stolen from the same batch as the one on which the indictment was based. Both of the orders had been made payable to the defendant, negotiated in temporal proximity to the one giving rise to the indictment, and similarly endorsed. The court held that the government's proof fell short of establishing that the defendant had placed the other money orders in interstate commerce. *Id.* at 995. Because of this missing element of proof—that the defendant actually placed the extra-indictment money orders into interstate commerce by negotiating them—the other offenses, if offenses at all, were neither the same as nor similar to the offense for which the defendant was standing trial. *Id.* at 995. Because the other offenses differed as to the "essential physical elements of the offense charged," the evidence lacked sufficient probative value to outweigh the prejudice inherent in other crimes evidence and thus was not properly admissible. *Id.* at 994-95. The Fifth Circuit repudiated the *Broadway* standard that the other crime be proved by "plain, clear, and convincing" evidence because it imposed too strict a standard of proof on the government under the conditional relevancy standard of Rule 104(b). *Beechum*, 582 F.2d at 912-13. In the court's view, the *Broadway* approach erroneously required that the evidence possess "great probative value" without regard to the balancing mandate of Rule 403. *Id.* at 913.

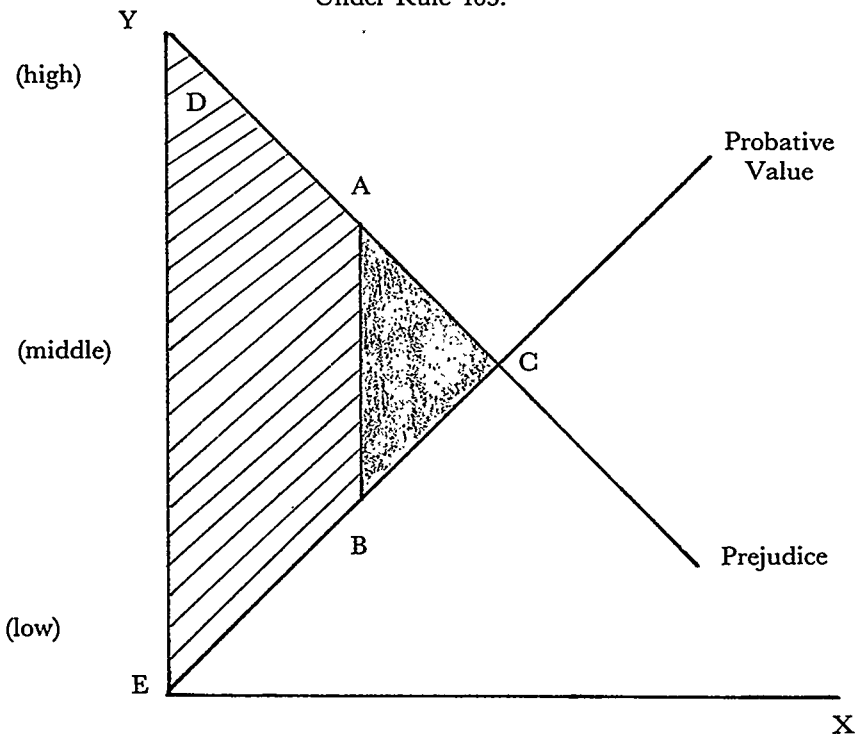
As recognized by the *Beechum* court, the "plain, clear, and convincing" standard seeks to assure that the probative value of the other crimes evidence is sufficiently high to offset its inherent prejudice. This article criticized that standard as too wooden in light of the protean character of the prejudice that must be balanced against probative value under Rule 403. "Great probative value" will not be necessary to survive the Rule 403 balance when the other crimes evidence carries a low risk of unfair prejudice. The immutable "plain, clear, and convincing" standard in *Broadway* is a way, albeit erroneous, of striking the balance between probative value and prejudice to decide the admissibility of conditionally relevant other crimes evidence.

The standard of proof for evidence presenting a question of conditional relevancy should not be confused with a standard of proof applied to preliminary factfinding. Regardless of the standard used by the court in preliminary factfinding, the judge's task is to decide the preliminary fact and not, at least at this stage, to balance under Rule 403. For example, when a proponent of a document seeks to introduce secondary evidence of the document over the opponent's best evidence objection, before the secondary evidence will be admitted, the judge must decide by a "preponderance of the evidence" whether the original was lost or destroyed. On the other hand, the question of whether the document ever existed is one of conditional relevancy that the jury must decide. The judge's ruling is limited to determining: (1) whether sufficient evidence exists to support a jury finding that the document existed and (2) whether any danger of unfair prejudice outweighs the probative value of the evidence. In striking this balance, the judge must consider, among other factors, the proof that the document existed.

80 The Fifth Circuit's balancing analysis in *Beechum* considered the aspect of probative value that depends upon the need for the evidence, its persuasiveness, and the proximity of

prejudice and probative value under this balancing rule is illustrated

Figure 2. Unfair Prejudice, Probative Value, and Balancing Under Rule 403.



Assuming equal values on the X and Y axes, this graph depicts the two aspects of evidence—probative value and unfair prejudice (including the other policy counterweights set forth in Rule 403). The most troublesome evidentiary problems for judges arise in the shaded portion, triangle A,B,C. In this area the prejudice of other crimes evidence does not clearly "substantially outweigh" probative value, as it does in the striped area, trapezoid A,B,D,E. As the quantitative relationship between prejudice and probative value approaches equality at C, admissibility becomes more clearly warranted under Rule 403. Evidence possessing probative value beyond C is clearly admissible, since any problems of prejudice are outweighed. Analytically, in the context of other crimes evidence, increased certainty that the other crimes occurred produces movement upward along the probative value curve, making admission under Rule 403 more likely.

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the other crimes to the charged offense. 582 F.2d at 917. It also considered the impact of other crimes proof on probative value. See notes 38-44 *supra* and accompanying text for the discussion of the impact of proof on probative value. These excerpts from the court's opinion indicate that the proof of stolen credit cards was more than "sufficient to support a jury finding" and in fact supplied enough probative value to tip the balance in favor of admissibility. Furthermore, the court implicitly recognized the relationship between proof and probative value in its balancing analysis:

The probity of the credit card evidence in this case is augmented by the lack of

in Figure 2. At this second step of the balancing analysis, the proof that the defendant committed the other crime becomes crucial. For only if the proof rises to the requisite level of certainty may it be deemed probative enough to tip the balance in favor of admissibility. This is true even though the proof might have met the sufficiency standard under Rule 104(b). Conversely, if the evidence does not establish to the appropriate degree of certainty that the defendant committed the other crime, the danger of unfair prejudice will substantially outweigh it, and the evidence should be excluded under Rule 403.[81]

D. *Unfair Prejudice and Proof Problems in Recent Court Decisions*

Recent federal cases citing Rule 404(b) reveal that risk of prejudice is a major factor in determining how high a degree of certainty will be required. Evidence of other crimes involving a high risk of unfair prejudice because of its similarity to the charged offense, reprehensibility, or a combination of the two, entails a stricter scrutiny of probative value than does evidence of other crimes with a low risk of prejudice.

The evidence of other crimes admitted by the trial court in *United States v. Leonard*[82] involved a low risk of prejudice because it bore little similarity to the charged offense and was not reprehensible. The defendant was charged with intentionally underestimating adjusted gross income on his 1967 and 1968 income tax returns. To

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temporal remoteness. Although Beechum may have obtained the cards as much as ten months prior to his arrest for the possession of the silver dollar, he kept the cards in his wallet where they would constantly remind him of the wrongfulness of their possession.

582 F.2d at 917. The court thus regarded the length of time that Beechum had kept the cards as proof of his guilty intent.

81 One might argue that less certainty of truth reduces probative value and the danger of unfair prejudice together, so that the sliding scale should not assume that prejudice is at a maximum magnitude while probative value varies with the proof. Rather, when, assuming the maximum probative value as well as prejudice, when there is "sufficiency" and when prejudice does not substantially outweigh probative value, the evidence should be admitted.

This argument ignores the inference of bad character that immediately attaches when one is accused of wrongdoing. There is evidence that such inferences linger even after a defendant has been officially exonerated of any wrongdoing. *See, e.g.*, Hunt, *John Connally Stirs Up Many Strong Emotions Among Friend and Foe . . . Wheeler-Dealer Image Hurts,* Wall St. J., Aug. 6, 1979, at 1, col. 1; *see also* 223 NATION, Sept. 4, 1976, at 164-65 (suggesting Connally's guilt even after he was acquitted). This writer perceives prejudice to be a relatively stable phenomenon, while probative value varies with factors such as proof of the other crime. *Cf.* notes 136-45 *infra* and accompanying text.

82 524 F.2d 1076 (2d Cir. 1975).

prove intent, the government presented evidence of an allegedly false 1969 affidavit in which the defendant denied having any foreign bank accounts or dealings with a foreign bank and a 1971 admission that he possessed a Swiss bank account. The judge admitted the evidence along with testimony of a Chase Manhattan Bank ("CMB") official that in 1968 his bank delivered to the defendant six official CMB checks totaling $383,000 issued pursuant to instructions from a Swiss bank.[83]

The defendant raised two arguments relating to the sufficiency of the other crimes evidence. First, he argued that the bank manager's testimony regarding the transfer of funds, combined with the 1971 admission regarding a personal Swiss bank account, did not show that he personally had a Swiss bank account in 1969. He argued that the account from which the funds were transferred might have belonged to a corporation owned by him or even to an outsider and, therefore, that the evidence did not warrant admission because it did not show with sufficient certainty that the 1969 statement concerning his personal bank account was false. The Second Circuit agreed with this contention.[84]

Second, Leonard argued that the same evidence was insufficient to show the falsity of the 1969 statement denying "any transactions or dealings of any nature with any foreign banks or other representatives." He argued that the transactions testified to by the CMB manager were between CMB and him and were not dealings with a foreign bank. The court rejected this argument as "formal to an extreme" and held that it was more reasonable to conclude that CMB had simply been a conduit for the transmission of funds from the Swiss bank. The court deemed the evidence sufficient to prove that Leonard knowingly received money from a foreign bank based on the following considerations: the transfer of the funds from a Swiss numbered account made direct evidence of the account owner impossible; because of the amount of money involved, it was highly likely that Leonard knew its origin; he had no account at CMB; the method chosen to deliver the official CMB checks to him was unusual; and he took considerable steps to keep the checks out of his First National City Bank account.[85]

Regarding the prejudice associated with the evidence in *Leonard*, the court reasoned:

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83 *Id.* at 1086.

84 *Id.* at 1090.

85 *Id.*

> It is true that transacting business with Swiss banks, or lying about not having done so, is rather more likely to "arouse the irrational passions of the jury" than was evidence of the claiming of an improper deduction in an income tax return in *United States v. Kaufman* [453 F.2d 306 (2d Cir. 1971)]. . . .
>
> At the same time, we think that the defendant has overstated the case in claiming that this line of proof was "highly inflammatory." The evidence was hardly the equivalent of a bloody shirt, compare *State v. Goebel*, 36 Wash. 2d 367, 379, 218 P.2d 300, 306 (1950), a dying accusation of poisoning, *Shepard v. United States*, 290 U.S. 96 . . . (1933), . . . or a claim of homosexuality . . . . Moreover, defendant's counsel at trial must not have considered it to be that damaging, for he was willing to bring out additional allegations of foreign bank connections if they could be used for his own purposes.[86]

The Second Circuit's decision in *Leonard* thus demonstrates the operation of Rule 104(b)'s "sufficiency" requirement, as well as the role of prejudice in setting the required standard of proof. Since the testimony of the CMB manager and defendant's 1971 admission were insufficient to permit a jury to find that Leonard owned a Swiss account on or before the date he executed the affidavit denying it, the evidence of the affidavit's falsity was held excludable. Of course, evidence of other crimes with a low risk of prejudice, such as this, will not be admitted if it does not rise to the threshold level of "sufficiency" mandated by Rule 104(b).[87] Evidence not meeting that standard of sufficiency can have only de minimis or no probative value at all.

On the issue of whether the 1969 affidavit falsely asserted that the defendant had had no dealings with a foreign bank, the CMB manager's testimony should be sufficient to support an inference that Leonard knew he was dealing with a foreign bank. However, the apparent absence of any statements made by Leonard during the six or more meetings between the manager and him indicating that he knew the origin of the checks raises questions about the strength of the inference. Similarly, the indeterminant number of possible origins of the funds increases the likelihood that Leonard did not know the foreign bank origins of the funds. The court's willingness to lower the requisite certainty of proof in this instance is tied to its finding that no high risk of prejudice resulted from admitting the

86 *Id.* at 1091-92.

87 *See* United States v. Roglieri, 700 F.2d 883, 886-87 (2d Cir. 1983) (distinguishing United States v. Robinson, 545 F.2d 301 (2d Cir. 1976)).

evidence.[88]

The other crimes evidence approved by the Second Circuit in *United States v. Birney*[89] provides an excellent example of middle risk prejudice.[90] The defendant, a former bank teller, was charged with making false entries on her teller proof sheets on three separate occasions in violation of a federal statute.[91] In furtherance of the prosecutor's theory that she had made them to cover up an uncharged embezzlement, the trial court admitted evidence that she had embezzled money from the bank. The proof consisted of two bank audits of her cash drawer, one of which showed "a substantial shortage ($39,000), thus pointing to the possibility of embezzlement."[92]

While the extrinsic crime of embezzlement in *Birney* involved a substantial sum of money, it was a non-violent crime not very high on the scale of reprehensibility. Furthermore, it was sufficiently dissimilar to the charged offense to avoid the problems of misestimation and confusion that arise when the uncharged offense is very similar to the charged one.[93] While the documentary proof of embezzlement

88 *See* text accompanying notes 46-48 *supra*.

89 686 F.2d 102 (2d Cir. 1982).

90 In the middle risk range of prejudice, the uncharged offense is entirely dissimilar, or generally similar but specifically dissimilar, to the charged offense, and is neither inoffensive nor highly reprehensible. *See, e.g.*, Government of Virgin Islands v. Joseph, 685 F.2d 587 (3d Cir. 1982) (where in a prosecution for first degree assault, robbery, and rape, the prosecutor introduced evidence that the defendant carried a black gun under the seat of his car. Possession of the gun in this case might have been deemed low risk evidence but for the role of a gun used by the offenders perpetrating this heinous crime.); *see also* United States v. Mastrototaro, 455 F.2d 802 (4th Cir. 1972)(where in a prosecution for aiding and abetting in the interstate transportation of three stolen United States treasury bills, the court upheld the introduction of evidence that the defendant had arranged gambling junkets to London and Haiti and controlled a gambling and loan sharking organization); United States v. Mortazavi, 702 F.2d 526 (5th Cir. 1983) (This case involved a prosecution for conspiracy to possess methamphetamine with intent to distribute. The court held that the trial judge did not err in admitting into evidence testimony that the defendant nine years earlier had negotiated a large sale of marijuana to a government agent. This evidence lies in the middle of the reprehensibility scale since it involves marijuana rather than a more destructive drug and is generally similar to the charged offense but specifically dissimilar.); United States v. Tisdale, 647 F.2d 91 (10th Cir. 1981)(involving a prosecution for the interstate transportation of stolen property and sale of a stolen antique tea set; evidence introduced that defendant offered to sell a government informer 500 pounds of marijuana).

91 18 U.S.C. § 1005 (1976).

92 686 F.2d at 106. Another judge had dismissed a charge of embezzlement against the defendant after a four-day hearing when he concluded that she "had suffered substantial prejudice with respect to her ability to defend herself against the embezzlement charge because of negligence on the part of the Government in failing to retrieve and safeguard documentary evidence bearing on the issue of her guilt or innocence." *Id.* at 104. Three years intervened between the grand jury's subpoenaing the bank records that revealed the shortage and her indictment for embezzlement.

93 *See, e.g.*, United States v. Robinson, 700 F.2d 205, 212-14 (5th Cir. 1983). The court

was apparently not overwhelming in *Birney*, evidence of the shortage was found "sufficient" to support a finding of embezzlement.[94] When considered with the evidence of the false entries, it becomes even more persuasive.[95] The moderate level of certainty appearing in the other crimes evidence in *Birney* is justified by the intermediate risk of prejudice that it produced.

Nonetheless, the standard of proof in *Birney* falls short of the higher certainty that is required in high risk cases. In *United States v. Morris*,[96] the defendant was convicted of transporting minors and an adult across state lines for purposes of prostitution. The prosecution introduced evidence from one witness that the defendant had broken into her house several times, abducted her, and beaten her. On at least one occasion the beating was for the witness' failure to turn over her earnings to him. The witness' story was corroborated by her mother and hospital records. The trial judge admitted the evidence to show both the nature of defendant's relationship with the witness and his ability to transport her in interstate commerce.

The other crimes evidence in *Morris* was highly reprehensible, invoking fears about violence and the security of home and person. With the added offensiveness of human exploitation inherent in the pimp-prostitute relationship, the resulting high risk of prejudice required a high standard of proof that the defendant had in fact committed the break-ins and beatings. That high standard was satisfied by the documentary and testimonial corroboration of the apparently credible evidence given by defendant's victim. This high standard would not have been met, however, if her testimony had been either

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held that evidence of a county supervisor's statements to a prospective seller of private land to the county that the sale could be made only if the seller gave him a specified three-acre tract of the land, followed by the county's purchase of the land, was admissible on the issue of intent. The defendant was being tried for conditioning a prospective contractor's well-drilling contract on his willingness to drill a free well for the defendant. Though the offenses were not identical, they were of the same "genre," and so created not only a stronger inference on the issue of intent but also a greater potential for jury misuse of the evidence.

94 The Second Circuit in *Birney*, 686 F.2d at 106-07, did not analyze the evidence's probative value. It merely found no abuse of discretion in the trial judge's instruction directing the jury to consider the embezzlement evidence on the issue of motive only.

95 In this sense the case looks very much like a plan or scheme case, where the probative value of the evidence increases because of its logical fit with other parts of the scheme. *See* notes 129-35 *infra* and accompanying text.

96 700 F.2d 427 (1st Cir. 1983). For other examples of evidence which risks a high degree of prejudice because of its reprehensibility, see United States v. Bradshaw, 690 F.2d 704 (9th Cir. 1982)(kidnapping case; evidence introduced that defendant gave drugs to and had sexual relations with a nine-year-old boy); United States v. Calvert, 523 F.2d 895 (8th Cir. 1975)(wire and mail fraud of an insurance company; evidence introduced that defendant had murdered his partner in an earlier scheme).

uncorroborated or vague and unspecific about either the break-ins and beatings or about her assailant's identity.[97]

The problem of high prejudice resulting from great similarity between the charged and uncharged offenses is often encountered where other crimes evidence is offered on the issue of intent.[98] Because the persuasiveness of other crimes evidence in proving intent rests upon the strength of the inference that the same intent fueled both the uncharged and charged offenses, it is best shown by establishing the similarity between the crimes.[99] Simultaneously, there is great potential for a jury to misuse evidence of other, highly similar crimes by inferring the defendant's criminal disposition from it or by

97 *See* United States v. Biswell, 700 F.2d 1310, 1318 (10th Cir. 1983)(Vagueness of the other crimes evidence "made its reliability questionable and diminished its probative value.").

In the prosecution of a defendant for the receipt of stolen property, a specific intent crime, the Fourth Circuit in United States v. Melia, 691 F.2d 672, 676-77 (4th Cir. 1982), assumed that the evidence of defendant's prior receipt of stolen property was relevant. The court found, however, that the prosecution witness' vague descriptions of the prior incidents gave the evidence questionable reliability and diminished its probative value. *Id.* at 677. The witness had pleaded guilty to burglary. He testified that he and an associate, who had participated in the burglary of a jewelry store from which the goods had been stolen and who later disappeared, had been to the defendant's house several times and had once attempted to sell stolen goods to the defendant. He testified that he had discussed other possible burglaries with the defendant on that occasion but could provide no details about the dates of the visits, the places visited, the names of persons contacted, or the jewelry stolen, "except that the sale of jewelry involving Melia was to an 'older gentleman, tall . . . gray hair, very dignified looking.' " *Id.* at 675. Another government witness testified that he and the defendant sold stolen goods to a doctor and met the next day in a hospital room to complete the transaction. While admitting that the defendant was his barber and patient, the doctor denied receiving stolen goods from him. The government produced no evidence of the existence of a hospital nor of a room in a hospital matching the government witness' description. The high degree of similarity between the other crimes evidence and the charged offense would require this article's strictest standard to scrutinize the other crimes proof.

See also United States v. Evans, 697 F.2d 240 (8th Cir. 1983), in which the Eighth Circuit discussed the sufficiency of other crimes evidence admitted under its "clear and convincing evidence" standard. The evidence was held properly admitted, even though given by a government informant and uncorroborated, where the testimony was unambiguous and specific. *Id.* at 249. The informant had testified "to when the transaction occurred, what substance was involved, how much of it was involved, and who participated in the transaction." *Id.*

98 Highly similar other crimes evidence is usually at issue in cases where the prosecutor is seeking to prove intent. But while both probative value and prejudice are deemed to increase with similarity, not all intent evidence is highly similar. *See, e.g.*, United States v. Biswell, 700 F.2d 1310 (10th Cir. 1983) (in trial for unauthorized use, acquisition, and possession of food stamps, evidence introduced of gambling and receiving stolen goods); United States v. Tisdale, 647 F.2d 91 (10th Cir. 1981) (in trial for interstate transportation of stolen property and sale of stolen goods, evidence introduced of intent to sell marijuana). For a discussion of modus operandi evidence, see text accompanying notes 139-48 *infra*.

99 *See* United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978).

considering the evidence cumulatively.[100]

The other crimes evidence admitted by the trial court in *United States v. Jones*,[101] for example, involved a high risk of unfair prejudice because of its similarity to the charged offense.[102] The defendant was being tried for intentionally distributing quaalude, a Schedule II controlled substance, in violation of a federal statute that prohibited its distribution without a legitimate medical purpose and outside the course of professional practice. The prosecutor introduced evidence of 478 other prescriptions issued by the defendant for Schedule II drugs, plus testimony that several of the patients named on the prescriptions were recognized drug addicts, to show the defendant's knowledge and unlawful intent in prescribing the quaalude.

The Eighth Circuit on appeal held that the proof did not sufficiently establish that any one of the 478 prescriptions had been issued outside of the bounds of the professional relationship between doctor and patient. While acknowledging that the testimony of the police officers suggested illegal distribution to recognized drug addicts, the court was unwilling to admit the evidence without a higher degree of certainty.[103] Since the 478 other prescriptions offered in *Jones* were for the same type of drug whose alleged unlawful distribution led to the defendant's prosecution, a jury was more likely to infer that defendant was "a drug pusher" and base a finding of guilt on this inference than to rest its conclusion on evidence relating to the particular charged offense. Such an inference would be precisely the

100 *See* note 48 *supra*.

101 570 F.2d 765 (8th Cir. 1978).

102 For other examples of other crimes evidence entailing a high risk of prejudice because of their similarity to the charged offense, see United States v. Scott, 701 F.2d 1340 (11th Cir. 1983)(prosecution for making false representations to secure a loan or property; evidence of other such false applications); United States v. Parker, 699 F.2d 177 (4th Cir. 1983) (prosecution for impersonating a federal agent; evidence introduced of a telephone conversation in which the defendant repeated his impersonation); United States v. Dixon, 698 F.2d 445 (11th Cir. 1983)(prosecution for wilfully understating tax liability for 1975 and 1976; evidence introduced of such understatements for 1977); United States v. Edwards, 696 F.2d 1277 (11th Cir. 1983)(conspiracy to possess, import, and distribute more than 1,000 pounds of marijuana, and distribution of one pound; evidence introduced of the importation and possession of marijuana on other occasions); United States v. Fischel, 693 F.2d 800 (8th Cir. 1982)(prosecution for possession of methamphetamine with intent to distribute; evidence introduced that the defendant distributed methamphetamine at a party two months after the indictment); United States v. Melia, 691 F.2d 672 (11th Cir. 1982)(prosecution for receiving stolen property; evidence introduced of the uncharged receipt of stolen property). The court's acknowledgement suggests that the 104(b) "sufficiency" standard was satisfied in *Jones*.

103 570 F.2d 765, 768 (8th Cir. 1978). The court's acknowledgement suggests that the 104(b) "sufficiency" standard was satisfied in *Jones*.

one prohibited by Rule 404(b).[104] Apart from the issue of intent, the jury was also more likely to confuse the issues by treating evidence of the other prescriptions as support for a finding that the defendant unlawfully prescribed drugs as charged. Even in the absence of such confusion, the jury was likely to misestimate the value of evidence of similar unlawful prescriptions in proving unlawful intent.[105] The court thus correctly decided that absent greater certainty that the defendant had committed the extrinsic offenses, the probative value of the evidence in *Jones* was substantially outweighed by the dangers of unfair prejudice, confusing the issues, and misleading the jury.[106]

E. *Special Cases*

In prosections for child abuse, other crimes evidence is generally relevant to show absence of mistake or accident. Because the victim is generally unable to communicate effectively what happened, need for this evidence can practically always be shown. That is, other crimes evidence often has significant probative potential in child abuse cases. On the other hand, because of the jury's presumed angry reaction to parental abuse of defenseless children, the degree of prejudice is unusually high. It is not surprising to find, therefore, that in this class of cases courts are very careful in their analysis of proof and require a high standard of certainty before admitting this evidence.[107]

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104 *See* note 6 *supra*.

105 *See* R. LEMPERT & S. SALTZBURG, *supra* note 1, at 160-62.

106 570 F.2d at 769; *see also* United States v. James, 555 F.2d 992 (D.C. Cir. 1977), in which the other crimes evidence combines the features of reprehensibility and similarity. The defendant had been charged with the knowing possession of heroin with intent to distribute. He claimed that the heroin seized from his jacket at the time of his arrest had been placed there by police officers. *Id.* at 955. The prosecutor attempted to show that the defendant had possessed heroin sixteen days after his arrest for the charged offense by showing that he was in an apartment where a large quantity of heroin was found. The court found that the proof of the defendant's mere presence in the apartment, without linking the heroin found there to him, produced only a weak inference of intent that was substantially outweighed by the inherent unfair prejudice of his subsequent arrest for possession of drugs. *Id.* at 1000-01.

James reveals again that other crimes evidence can overcome the "sufficiency" hurdle of Rule 104(b) and still be insufficiently probative to offset the risk of unfair prejudice. The lack of sufficient probative value resulted from an absence of adequate proof connecting the defendant with the extrinsic crime.

107 In United States v. Brown, 608 F.2d 551 (5th Cir. 1979), for example, the Fifth Circuit reversed the conviction of the defendant for recklessly and with criminal negligence causing bodily injury to a child. The reversal was based on the improper admission of photographs and testimony concerning multiple facial and bodily bruises and of earlier hospitalizations of the child prior to the incident in question. Without discussing prejudice, the court held that the proof failed to demonstrate either that an offense had been committed or that the defend-

A category of cases where the theory suggested in this article, tying the standard of proof to amount of unfair prejudice, may appear in practice to break down is the prosecution of illegal aliens.[108] Trial courts, affirmed by circuit courts, apply a lower standard in admitting evidence of similar offenses, notwithstanding their acknowledgment of the high risk of prejudice.[109] These decisions are

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ant had committed it. This shortcoming rendered the evidence inadmissible under *Beechum*. *Id*. at 554-55.

Intrinsically, the evidence in *Brown* was highly prejudicial because of its offensiveness and close similarity to the crime charged in the indictment. Thus, while the photographs and testimony supported an inference of criminal negligence, the probative value produced by this showing was too weak to justify admission.

Conversely, in United States v. Colvin, 614 F.2d 44 (5th Cir. 1980), a case factually similar to *Brown*, the Fifth Circuit affirmed the conviction of the defendant for the second-degree murder of her infant daughter. The trial court admitted testimony revealing that the defendant had admitted to two different persons that she had repeatedly struck her daughter's head against a tile floor approximately ten days before her death, and evidence that her daughter had been hospitalized about two months before her death for treatment of rib, clavical, and leg fractures. Distinguishing its decision in *Brown*, the court held that the government's proof in *Colvin* was sufficient for a jury reasonably to conclude that the defendant was responsible for the injuries shown by the other crimes evidence. The proof consisted of the defendant's admissions that she had had exclusive control over her daughter at the time of her injuries and that she had inflicted injuries upon the child. The court concluded that the "probative value of the evidence outweighed the danger of any prejudicial effect." *Id*. at 45. The defendant's voluntary *admission* of the other crimes, of course, meets the highest standard of proof.

In United States v. Harris, 661 F.2d 138 (10th Cir. 1981), a child abuse case upholding a conviction for second-degree murder, the Tenth Circuit distinguished *Brown*, holding that "the evidence in the instant case, considered in its totality, permits the inference that it was the defendant, and not someone else, who battered his son on the other occasions." *Id*. at 143. The *Harris* court acknowledged the prejudicial nature of the "battered child" evidence but cited language from the Fourth Circuit's opinion in United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974), stating that evidence of repeated incidents of child abuse is especially relevant since it may be the only means to prove the crime. 661 F.2d at 142. As to proof that the defendant caused the earlier injuries to his son, the court noted the following items of evidence: (1) defendant's opportunity to injure his child based on the increased time spent with the child after his mother returned to work; (2) the testimony of babysitters tending to negate the possibility that someone else injured him; (3) his wife's denial that she struck the child, although she attributed the injuries to an accident; and (4) his admission to psychologists of a mental problem which possessed him with an urge to harm his children. Medical testimony also established the probability that the injuries came from external blows rather than from an accident. The court concluded that while there was no direct evidence that the defendant caused the earlier injuries, the circumstantial evidence convincingly pointed to him. *Id*. at 140-42.

For a discussion of United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974), see notes 126-29 *infra* and accompanying text.

108 *See* United States v. Herrera-Medina, 609 F.2d 376, 379-81 (9th Cir. 1979) (and cases cited therein).

109 The Ninth Circuit's decision in United States v. Herrera-Medina is questionable regarding its finding of sufficient probative value to justify admissibility. In that case the defendant was convicted for unlawfully transporting four illegal aliens. The other crimes

aberrational and are possibly explained by the courts' sensitivity or oversensitivity to the difficult social problems caused by illegal immigration.[110]

IV. The Sliding Scale of Proof—The Second Step in the Balancing Process

A. *Weighing the Evidence Assuming One Hundred Percent Certainty*

Since other crimes evidence is admissible only for a relevant purpose, the admissibility analysis should begin by identifying the issue for which the other crimes evidence is being offered. In the hypothetical murder trial discussed in Section II, if the defendant denies committing the murder, the prosecutor may seek to introduce evidence of the First National Bank robbery to establish that the defendant had a motive and is thus more likely to have committed the murder that he denies.[111] Initially, the judge must determine the prejudicial danger of the other crimes evidence considering such factors of prejudice as similarity and reprehensibility. He should also consider external factors, such as potential for confusing or misleading the jury, and whether the defendant can effectively rebut evidence of other crimes without unduly delaying the final resolution of the case. Applying these principles to the hypothetical murder trial, the judge will find that if it can be proved that the defendant robbed the bank in the presence of the victim, who knew him, the evidence would be relevant to his motive to commit murder.

The court might further find that the evidence is needed to establish motive.[112] In analyzing the degree of unfair prejudice

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evidence admitted at trial consisted of two prior arrests involving the transportation of illegal aliens. 609 F.2d at 378. Because the evidence was offensive, given current public attitudes toward illegal aliens, and contained high similarity to the conduct leading to indictment, it possessed a high risk of prejudice. The government's other crimes proof was circumstantial and in at least one case inconclusive. *Id.* at 378-79.

While acknowledging that the government's failure to prosecute weakened the probative value of the evidence and that the risk of prejudice was high, the court nevertheless held the evidence to be admissible. *Id.* at 380. The decision cited two other cases involving illegal aliens where a lower standard of other crimes proof was applied by the court. *Id.*

110 Lopez, *Undocumented Mexican Migration: In Search of Just Immigration Law and Policy*, 28 U.C.L.A. L. REV. 615, 637-38 (1981).

111 *See* text accompanying notes 19-32 *supra*.

112 It should be noted that "need" as a component of probative value is distinguishable from "logical persuasiveness" and "certainty." The latter two are inherent qualities of the evidence as it relates to one or more factual issues. Need, on the other hand, is a question about the amount of evidence required on a particular factual issue. Under Rule 403, while persuasiveness and certainty are to be balanced against dangers of prejudice, confusion, or misleading the jury, need in the sense of incremental probative value must be balanced

presented by this evidence, the judge should consider the reprehensibility of the robbery and its similarity to the charged offense. While it is not identical to murder, the robbery with its overtones of violence and intimidation would place quite high on the scale of reprehensibility. Such prejudice would call for a high countervailing standard of proof on the sliding scale.

The judge should first assume that the prosecutor can establish with complete certainty that the defendant committed the robbery and balance this maximum potential probative value of the other crimes evidence against its harm.[113] If its potential probative value is substantially outweighed by its prejudice, the evidence should be excluded and the analysis concluded at this point.

B. *Adjusting the Balance*

If the potential probative value of the evidence is high enough to survive this first step in the two-fold balancing test, the judge should then consider the strength of the evidence actually supporting an inference that the defendant committed the other crime. The potential probative value of the other crimes evidence, based upon the previously assumed one hundred percent certainty that the defendant committed the other crime, should then be reduced by the unavailable or missing proof supporting the other crimes evidence. The judge should adjust the first balance to reflect this reduction to *actual* probative value and once again strike a balance to determine whether the degree of prejudice (unchanged from the first balancing test) substantially outweighs the actual probative value of the evidence. If the evidence is insufficient to support a jury finding that the defendant committed the other crime, it can clearly be excluded under Rule 104(b). Even if the evidence would support a jury finding, but its actual probative value is substantially outweighed by unfair prejudice, the evidence should be excluded under Rule 403. If the evidence is sufficient under Rule 104(b) and its actual probative value is *not* substantially outweighed by prejudice, the evidence should be admitted under Rule 403.[114]

In the hypothetical murder case, the second step of the balanc-

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against the needless presentation of cumulative evidence. The need factor is thus appropriately considered at this initial weighing of probative value against the Rule 403 counterweights.

113 *See* United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978); FED. R. EVID. 403.

114 The potential for prejudice will change where the proof results in less similarity. *See Beechum*, 582 F.2d at 913-14. What the prosecutor sought to establish as a similar crime may be shown by the proof to be only an innocent act. *See, e.g.*, note 106 *supra*.

ing analysis must follow the first. In step one, the judge assumes both that the prosecutor can prove with complete certainty that the murder victim witnessed the defendant's bank robbery and that the evidence is needed. He may conclude after this step that the prejudice does not substantially outweigh the potential probative value of the evidence. At step two, the judge would consider the prosecutor's actual quantum of proof that the victim saw the defendant commit the robbery. If the prosecutor could not show that victim knew or had any other connection with the defendant, the judge should exclude the evidence as insufficient under Rule 104(b).

Suppose the prosecutor could prove only that the victim was in the bank and knew the defendant at the time of the robbery, the defendant was a look-out stationed outside the bank, the bank had windows and glass doors, the victim was in a line of five customers waiting to be served with her back to the window, and the defendant glanced through the bank's window while acting as a look-out. Suppose further that the prosecutor was not able to show that the victim saw the defendant or that he saw her. This evidence would be sufficient to support a jury finding that the defendant knew that the victim had seen him take part in the robbery. However, since both the victim's presence as a witness to the defendant's crime and his knowledge of her presence are crucial to the inference of his motive, without a better showing of victim's and defendant's awareness of one another, the certainty of the facts offered to support an inference of motive would drop substantially. As a result, the potential probative value of the other crimes evidence for establishing the defendant's motive would be substantially reduced. In view of the high certainty requirement mandated by the other crime's high risk of prejudice, its actual probative value should be deemed insufficient to justify admission under Rule 403. The adjusted balance should be struck in favor of exclusion. On the other hand, if the prosecutor could produce evidence that the defendant and the murder victim knew each other and had exchanged glances during the robbery, the evidence's actual probative value would rise and tilt the balance in favor of admissibility.[115]

This two-step approach has four significant advantages. First, it recognizes the distinction between "sufficiency" determinations for questions of conditional relevancy and balancing to determine admissibility under Rule 403. Second, it removes the misconception that it is helpful in this situation to categorize standards of proof in

115 *See* notes 38-44 *supra* and accompanying text.

terms of "preponderance of the evidence," "clear and convincing evidence," or "beyond a reasonable doubt."[116] This static view is fundamentally inconsistent with the balancing approach required by Rule 403.[117] Third, it uncovers and gives an analytical structure to what judges have often done intuitively.[118] Fourth, the balancing analysis will assist Fifth Circuit trial courts, and those in other circuits that are likely to follow the Fifth Circuit's lead, who upon the request of a party are required to make "on the record" findings under *Beechum*. Such courts must articulate their analysis of whether the probative value of other crimes evidence is substantially outweighed by prejudice.[119]

C. *Applying the Sliding Scale to Other Crimes Evidence*

The sliding scale analysis of other crimes proof would have produced a different result in *United States v. Dolliole*.[120] The defendant was convicted of participating in a Chicago bank robbery as the driver of a getaway car. He had waited in the car in the bank's parking lot while his passenger robbed the bank. After his passenger returned, the defendant drove the car from the bank but was arrested moments later. He claimed that he had no knowledge of his passenger's participation in a robbery and that he had driven him to the bank to cash a money order. Among the evidence introduced at trial by the prosecutor was the passenger's statement that defendant was his accomplice in an earlier robbery of the Hillside bank in suburban Chicago. This testimony was uncorroborated, impeached by two prior inconsistent statements, and denied by the defendant, who was never charged in the Hillside bank robbery. The trial court admitted the evidence.[121] The Seventh Circuit ruled that the trial court's admission of evidence of the Hillside robbery was proper, because it was relevant to the issue of defendant's intentional participation in the charged robbery, not unfairly prejudicial, and defendant's participation in the Hillside robbery was "clear and convincing."

The first step of the balancing process, balancing under Rule

116 *See* notes 11-14 *supra*.

117 *See* notes 7, 61-64 *supra* and accompanying text.

118 *See* notes 82-107 *supra* and accompanying text.

119 *See* United States v. Robinson, 700 F.2d 205, 213 (5th Cir. 1983), requiring the trial judge in Rule 404(b) cases to make an "on-the-record articulation . . . of *Beechum*'s probative value/prejudice inquiry when requested by a party." Other circuits have incorporated *Beechum*'s two-step analysis. *See, e.g.*, United States v. Edwards, 696 F.2d 1277 (11th Cir. 1983).

120 597 F.2d 102 (7th Cir. 1979).

121 *Id.* at 104-05.

403 assuming one hundred percent certainty, was properly carried out under this article's analysis. Evidence of defendant's participation in an earlier robbery where he drove a getaway car increases the probability that he knowingly participated in the charged robbery. In the absence of substantial evidence on the issue of intent, the probative value of the other robbery evidence is probably great enough to justify admission despite high prejudice. But after this initial balancing the court's analysis goes awry. Contrary to the court's finding, the Hillside robbery evidence carries a high risk of prejudice for two reasons: it is both highly similar to the charged robbery and a reprehensible crime. The risk of unfair prejudice is exacerbated by defendant's not having been charged, tried, or convicted for his participation in the Hillside robbery. This high risk of unfair prejudice should have required the judge to raise the standard of proof to ensure sufficient probative value to offset any disproportionate unfair prejudice. Instead, the trial court permitted impeached and uncorroborated testimony to establish the defendant's involvement in the Hillside robbery.[122] While admitting the possibility that testimony could be so incredible as to not meet the clear and convincing standard, the Seventh Circuit held that if the witness was to be believed, his testimony was sufficiently clear and convincing to be admitted.[123] The problem was precisely that the witness could not be believed because he had made two written statements that were inconsistent with his testimony. Furthermore, no one could corroborate the witness' in-court version of the facts. On this evidence, it remains highly questionable whether the defendant committed the Hillside robbery. The error in the court's ruling results from its failure to perceive fully the risk of unfair prejudice. In doing so it permitted the admission of highly prejudicial evidence with substantially lower probative value, in contravention of Rule 403.[124]

122 *Id.* at 106-08.

123 · *Id.* at 107. While this article supports the *Beechum* holding, which rejects a static standard such as "clear and convincing" evidence as governing the proof required for other crimes admissibility, the court's citation of the "clear and convincing" standard in *Dolliole*, *id.* at 106, is not out of line, since a higher standard than mere "sufficiency" is dictated by the amount of unfair prejudice generated by the evidence. While the court's adherence to such a high standard of proof may have been in error where the other crimes evidence carries a low risk of unfair prejudice, in this case this high standard is warranted. The problem in *Dolliole* is that the court actually applies a lower standard of proof in admitting the Hillside robbery evidence while articulating a much higher one.

124 *See* United States v. Shaw, 701 F.2d 367 (5th Cir. 1983), where the court permitted other crimes evidence without any proof. This ruling is clearly erroneous, although probably harmless error.

1. Multiple and Interconnected Prior Crimes

The sliding scale analysis has a peculiar application to a species of other crimes evidence characterized by high logical probative value—cases of multiple prior acts. Most other crimes evidence seems to involve a single act of misconduct.[125] There the problems of proof are self-contained, and the judge can make a relatively simple admissibility decision based on the circumstances surrounding the single act. Where the evidence of other crimes involves a pattern of multiple acts, the proof of each act could be considered separately in judging its probative value, or the court could consider the proof offered for the prior crimes in the aggregate in determining the probative value for each and all of them.

United States v. Woods[126] presents an example of the aggregative approach. In that case the defendant, a professional foster mother, was tried for murdering her eight-month-old foster son. Evidence showed that the baby died while in a coma produced by cyanosis, a condition caused by a lack of oxygen. To prove that the victim's death was not a result of accident or natural causes, as the defendant claimed, the prosecutor introduced evidence that she had had access to or custody of nine children over a twenty-four year period who had suffered numerous cyanotic episodes while in her care. Seven of them died.[127] It is obvious from the similarity and reprehensibile na-

125 *See, e.g.*, United States v. Roberts, 619 F.2d 379 (5th Cir. 1980); United States v. Shavers, 615 F.2d 266 (5th Cir. 1980); United States v. Cobb, 588 F.2d 607 (8th Cir. 1978); United States v. Drury, 582 F.2d 1181 (8th Cir. 1978); United States v. Beechum, 582 F.2d 898 (5th Cir. 1978); United States v. Juarez, 561 F.2d 65 (7th Cir. 1977); United States v. Schoole, 553 F.2d 1109 (8th Cir. 1977); United States v. Cyphers, 553 F.2d 1064 (7th Cir. 1977); United States v. Jardan, 552 F.2d 216 (8th Cir. 1977); United States v. Testa, 548 F.2d 847 (9th Cir. 1977); United States v. Feinberg, 535 F.2d 1004 (7th Cir. 1976); United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975); United States v. Calvert, 523 F.2d 895 (8th Cir. 1975); United States v. Clemons, 503 F.2d 486 (8th Cir. 1974); United States v. Ostrowsky, 501 F.2d 318 (7th Cir. 1974).

126 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

127 *Id.* at 129-32. One of the children, who was less than two years old, had six cyanotic episodes over a 21-month period. No cyanotic difficulty was discovered during her hospitalization, and when she was removed from defendant's custody, the episodes did not recur. Another child, a one-month-old infant, had two episodes with the defendant. The child was hospitalized, but no problems were found. The child died two days after being released from the hospital. Although defendant claimed she was not present when the infant died, the government offered evidence to the contrary. A third baby, one month and twenty-seven days old, had spent the first three weeks of her life in a hospital and had thereafter suffered four or five cyanotic episodes while alone with the defendant. Her death occurred while in the arms of defendant, and the cause of death urged by the defendant was shown to have been extremely unlikely. In the remaining cases the victims ranged from three months and twenty-one days to three years, seven months. Each died from cyanotic episodes, except that

ture of this other crimes evidence that the danger of unfair prejudice to the defendant was substantial and required a high degree of offsetting probity to justify its admission. In using the aggregative approach to analyze the proof of defendant's guilt in the other deaths, the court noted that she had won a motion for acquittal in the case of one death because the government's proof was insufficient to support a jury verdict. It also acknowledged that the evidence was insufficient to establish her guilt in any single instance. But viewing the facts collectively, the court was persuaded that the defendant had caused all nine victims' deaths.[128] With the evidence of each additional child victim, it became increasingly likely that the death of the eight-month-old baby, for whose murder the defendant was being tried, was caused by her rather than by accident or nature. Hence the logical probative value of any individual incident increased with evidence of each additional one.[129] The combined proof that nine children were victims of cyanotic episodes while in the defendant's custody raises the probative value of this other crimes evidence. The court in *Woods* thus properly found that this evidence's high risk of prejudice did not substantially outweigh its very high probative value.[130]

Similarly, if the other crimes evidence is relevant because it is part of a single criminal transaction leading to the charged offense, proof of its occurrence will not be limited to the independent evidence of its occurrence. In those cases proof of any part of the trans-

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the three-year-old who had diptheria at the time of his death died while in bed with the defendant. The other children in the home who suffered from diptheria all survived. *Id.*

128 *Id.* The court noted that:

> [W]ith regard to no single child was there any legally sufficient proof that defendant had done any act which the law forbids. Only when all of the evidence concerning the nine other children and [the child for whose murder she was acquitted] is considered collectively is the conclusion impelled that the probability that some or all of the other deaths, cyanotic seizures, and respiratory deficiencies were accidental or attributable to natural causes was so remote, the truth must be that [the victim] and some or all of the other children died at the hands of the defendant.

Id.

In People v. Williams, No. 39631 (Ga. Dec. 5, 1983), where Wayne Williams was tried in the highly publicized Atlanta case, the prosecutor was permitted to introduce evidence of ten other child murders for which Williams was not on trial to show a "pattern or bent of mind," even though Williams was on trial for only two of them. Given the prejudicial nature of this evidence, a discreet, case-by-case analysis would have indicated insufficient probative value. Aggregated, the evidence of fibers, eyewitnesses, and blood type connecting Williams to the other murders was presumably much more convincing.

129 *See* notes 37 and 44 *supra* and accompanying text.

130 484 F.2d at 135.

action will tend to prove the entire occurrence.[131] *United States v. Derring*[132] provides an example. The defendant was tried for transporting a stolen vehicle in interstate commerce.[133] The prosecutor introduced evidence that the defendant had killed the car's owner, stolen the car, and thereafter tried to dispose of the car by selling it. The theft and murder were relevant because they provided a reason for the interstate transportation. Because these acts were inextricable parts of the whole criminal transaction, proof of the theft and murder was established in part by their logical fit into the transportation scheme, and in part by the evidence of the car owner's disappearance and a potential buyer's account of the defendant's admission of the theft and murder.[134] Having been resolved this way, the problem of proof was not even discussed by the appellate court in approving the trial judge's admissibility decision.[135]

In cases of multiple offenses constituting a pattern and cases of interconnected offenses forming an indivisibile criminal transaction,

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131 *See* United States v. Derring, 592 F.2d 1003 (8th Cir. 1979). The Derring court noted that:

> [W]here the evidence is relevant and competent to prove and establish a material fact for which the appellants are charged and the other offense is inextricably a part of the guilty act itself, the court does not commit error in allowing testimony of the other offense.
>
> . . . .
>
> If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for an offense which is itself a detail of the whole criminal scheme.

Id. at 1007 (citing Ignacio v. Territory of Guam, 413 F.2d 513, 520 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970)); *see also* United States v. Miller, 508 F.2d 444 (7th Cir. 1974).

132 592 F.2d 1003 (8th Cir. 1979).

133 *Id.* at 1004.

134 *Id.* at 1007. The court stated that "the theft, murder, interstate transportation and attempts to dispose of the automobile were part of a single transaction over a four-day period. Each of these acts was inextricably bound up with the others, and proof of the offense charged necessarily involved evidence of the other criminal conduct." *Id.*

135 *See also* United States v. Aleman, 592 F.2d 881 (5th Cir. 1979). The defendant and others were tried for possession of heroin and conspiracy. The Fifth Circuit approved the introduction of evidence of defendant's gift of cocaine to a government agency at the end of a meeting during which the defendant admitted conspiring with the other defendants to distribute heroin. The court held that the evidence was admissible because it was a crucial part of the meeting where the defendant made damaging admissions concerning his participation in the charged conspiracy. Proof of the entire transaction turned on the government agent's credibility. If his testimony is credible about one part of the transaction, it is extremely likely to be credible about the entire transaction. Hence, the relationship between the admission and the illegal gift as parts of a single transaction tends to prove that the gift was made. The court pointed out that the agent's testimony would have been "confusing had he not been able to explain how, eleven days after [two other defendants] had been arrested for heroin

the sliding scale of proof gives the judge the flexibility contemplated by Rules 402, 403, and 404(b). The standard of certainty required for each offense can easily be adjusted downward to recognize the increased probative value created by the relationship between the other acts and the charged offense. Yet the overall probative value of the other crimes evidence remains unchanged.[136] This adjustment makes it easier to demonstrate sufficient probative value to offset the policy counterweights of Rule 403.

2. Evidence with High Logical Probative Value

Evidence with high logical probative value carries more weight against unfair prejudice than evidence with lower logical probative value at the first step of the balancing process.[137] In adjusting the balance in the second step, less proof is necessary to offset unfair prejudice if its logical probative value is high than if it is lower. That is, the stronger the logical inferences created by the evidence, the greater its probative value.

For example, if a defendant is being tried for robbing a grocery store with a .357 magnum pistol, evidence that he robbed a sporting goods store two weeks before and took a .357 magnum produces a strong inference that he committed the grocery store robbery. If the prosecutor could establish the facts of the sporting goods store robbery and that the defendant was seen on the block of the sporting goods store shortly before and after the robbery, the probative value of that crime on the issue of identity would be quite high. On the other hand, if the prosecutor could establish only that the sporting goods store was robbed and a pistol taken, but not its make and model, the evidence would be less logically probative, and the proof of defendant's proximity to the scene of the robbery less productive of probative value.[138] Thus the same proof that generates high probative value where the logical inference is strong may be considerably less productive where the logical inference created by the other

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dealing, he and [the defendant] came to discuss [the defendant's] participation with [the other defendants] in the distribution scheme." *Id.* at 885.

It should be pointed out that this rationale does not apply where the instances of conduct are not sufficiently connected to constitute an indivisible transaction. See 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[16], at 404-85 to 404-91, for other examples of using evidence of other crimes to show "common plan or scheme."

136 It should be remembered, of course, that probative value is a function of the probability that the other crime occurred as well as of the persuasive value of the relevant inference. *See* note 33 *supra*.

137 *See* Dolan, *supra* note 7, at 233-35.

138 *See* notes 37-44 *supra* and accompanying text.

crimes evidence is weaker. Yet strong proof that the defendant committed the sporting goods store robbery, such as a witness' testimony that the defendant admitted involvement in the robbery and taking an unidentified pistol, would increase the probative value of this logically weak evidence on the issue of identity. It then follows that a lesser degree of certainty should be required where the other crimes evidence has high logical probative value, and more certainty is needed as logical probative value diminishes.

3. The Modus Operandi Exception

In one category of cases where the evidence is logically very probative, the sliding scale cannot be adjusted because of the concurrence of probative value and prejudice. Where other crimes evidence is sought to be introduced to establish the defendant's identity from his modus operandi, there is no movement along the sliding scale. Courts exclude other crimes evidence offered for this purpose unless there is sufficient similarity between the uncharged offense and the charged one to suggest that both are the defendant's handiwork.[139] These courts point out that the probative value of modus operandi evidence increases with both its uniqueness and the degree of similarity between the uncharged and the charged offense.[140] The more unique the common facts of the modus operandi, the fewer features needed to establish probity. The less unique, the greater number of common features needed to establish the evidence as probative of identity.[141] Probative value in modus operandi cases is thus a function of uniqueness, degree of similarity, and proof of defendant's connection with the uncharged offense. Recalling the discussion in Section III of this article, it is clear that along with increasing uniqueness and similarity, the elements of probative value in modus operandi cases, comes increased prejudice.[142]

Since modus operandi evidence that warrants admission is likely to generate a high degree of prejudice, the sliding scale demands

139 *See, e.g.*, United States v. Myers, 550 F.2d 1036 (5th Cir. 1977); *see also* C. McCORMICK, *supra* note 2, § 190, at 449.

140 In *Myers*, the court discussed this probative value standard stating that:

> A much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind. [Citations omitted.] We have consistently held that for evidence of other crimes to be admissible the inference of identity flowing from it must be extremely strong.

550 F.2d at 1045.

141 *Id.*

142 *See* note 48 *supra* and accompanying text.

greater proof that the defendant committed the other crimes than it does when the evidence entails lower levels of prejudice.[143] Simultaneously, there is downward pressure on the sliding scale, generated by the high logical probative value associated with the similarity and uniqueness requirements of establishing identity by modus operandi. More probative value is generated by each item of proof supporting the defendant's commission of the other crime than would exist for other crimes evidence that was less logically probative.[144] In this type of case, where both probative value and the risk of unfair prejudice are increased by the similarity between unique charged and uncharged offenses, the sliding scale is not adjusted downward as in the normal case of high logical probative value. In the latter case, risk of prejudice does not fluctuate with the probative value of the evidence.[145] But where similarity and uniqueness increase both probative value and risk of prejudice, these balancing factors cancel each other. Even though each item of proof produces more probative value, it simultaneously engenders more prejudice which it must offset. The coincidence of high logical probative value and great prejudice, both functions of the same elements of uniqueness and similarity, results in no net movement or in a static scale of proof.

At the same time, once a connection has been made between the defendant and the extrinsic offense, the evidence is practically conclusive on the issue of identity. The effective suspension of the sliding scale calls for the application of a standard of proof that is sensitive not only to risk of prejudice but also to the probative effect that modus operandi evidence is likely to have on the ultimate issue of identity. Since the sliding scale may not be helpful in this unusual case, the standard must be based on other considerations. Because the standard of proof beyond a reasonable doubt is generally applicable to each element of the criminal offense, it is the ultimate standard by which the quality of the evidence on each issue is tested. The factor

143 *See* text accompanying notes 46-48 *supra*.

144 See notes 136-37 *supra* and accompanying text, concerning the effect of logical probative value on the certainty requirement.

145 *See* note 81 *supra*. Another category of other crimes cases where prejudice might increase with probative value is intent cases, where the more similar the uncharged and charged offenses, the more probative and prejudicial the evidence. *See* United States v. Beechum, 582 F.2d 898, 913-14 (5th Cir. 1978). Other crimes evidence to prove intent, however, may be only generally similar—enough to infer the same state of mind for both the uncharged and charged offenses—or identical. *Compare* United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), *with* United States v. Fitterer, 710 F.2d 1328 (8th Cir. 1983).

The special analysis applicable in modus operandi would appear equally applicable where intent evidence is identical to the charged offense.

of need, generally considered at the initial balancing stage,[146] may serve as a benchmark signaling the appropriate standard of certainty for modus operandi evidence.[147] If the need for the evidence is high, the standard of proof of the other crimes occurrence should be correspondingly high. Perhaps the judge should be required to find that the evidence would permit a jury finding of the existence of the other crime beyond a reasonable doubt. If the need is marginal, yet sufficiently great to avoid exclusion as merely cumulative, the standard of proof should be lower. Accordingly, greater but not essential need for the evidence would warrant an intermediate standard.[148]

V. Conclusion

The Federal Rules of Evidence codified three well-established rules of evidence law: (1) the admissibility of evidence of other crimes, acts, or wrongs for a relevant non-character purpose in Rule 404(b); (2) the balancing of relevant evidence against the dangers of unfair prejudice and other potential misuse under Rule 403; and (3) the division of functions between the judge and the jury in deciding preliminary questions of fact in Rule 104.

Courts have been aware in varying degrees of the interplay among these three rules of evidence. However, one issue that has been characterized by a lack of clear analysis is the determination and use of an appropriate standard to decide the admissibility of other crimes evidence. The problem arises because evidence of other crimes may be admissible even if it has not been the subject of litigation. Without the proof of a supporting civil or criminal judgment, the question of whether the present defendant actually perpetrated the prior act may arise. This article has considered the proper approach to determining under the Federal Rules of Evidence the amount of proof required to show that a criminal defendant committed another crime before such evidence may properly be admitted at trial.

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146 *See* note 112 *supra* and accompanying text.

147 If the factor of need has any implications for the standard of proof of other crimes, and the writer contends that in the normal case it does not, it would seem to require higher certainty when the need for the evidence is great. See Dutton v. Evans, 400 U.S. 74 (1970), for the Supreme Court's perception, in the context of the confrontation clause, of the relationship between the importance of evidence and concerns about its reliability.

148 It should be remembered that any standard is easier to meet where there are multiple offenses to which defendant has been connected, as in the *Woods* case. *See* notes 125-36 *supra* and accompanying text.

Before the Fifth Circuit's decision in *United States v. Beechum*,[149] courts uniformly employed labels such as "preponderance of the evidence," "clear and convincing evidence," or "plain clear and convincing evidence" to determine the amount of scrutiny to which judges should subject proof of other crimes. In *Beechum*, the court pointed out that the question of other crimes proof was one of conditional relevancy requiring only a judicial determination of "sufficiency" to support a jury finding that the act was committed by the defendant.[150] The court also pointed out that the balancing requirement under Rule 403 is the same for relevant other crimes evidence as it is for any relevant evidence where the possibility of unfair prejudice requires it. Having struck two blows at eliminating judicial confusion about the role of judges in passing upon the adequacy of other crimes proof, the *Beechum* court failed to deliver the third.

When, if ever, is it necessary for a judge ruling on admissibility to consider the adequacy of proof beyond the finding of prima facie support for a jury finding mandated by Rule 104(b)? The answer is that this second step is almost always required when a court considers the admissibility of other crimes evidence. While the question of proof is one of conditional relevancy in the area of other crimes, this evidence is unique because of its potential for prejudice. The judge is thus nearly always called upon by Rule 403 to weigh the probative value of other crimes evidence against its danger of unfair prejudice and other potential misuse.

Probative value, on the other hand, is inter alia a function of the amount of proof that the criminal defendant committed the other crime—the more certainty that the defendant did the other act, the higher the evidence's probative value. Since the prejudice of admissible evidence cannot substantially outweigh its probative value under Rule 403, the standard of proof for balancing is tied to the danger of prejudice created by the evidence. A sliding scale of proof thus is necessary to accommodate the varying degrees of prejudice created by a kaleidoscope of other crimes evidence. The sliding scale presented here rationalizes unarticulated judicial behavior in the area of admitting evidence of other crimes. It also provides a useful tool for deciding the myriad cases of other crimes admissibility, including those presenting special problems of proof.

149 582 F.2d 898 (5th Cir. 1978).
150 *Id.* at 913.